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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 727

EDWIN K. ATWOOD, ALICE B. ATWOOD, BASCOM COX, FRED B. WAGNER, JOHN Q. ADAMS, E. WAYNE WILSON, and THOMAS HART FISHER,

Petitioners,

vs.

HUMBLE OIL & REFINING COMPANY, a Texas corporation, ELIZABETH A. BALDWIN, JAMES P. BALDWIN, RICHARD W. ATWOOD, a non compos mentis, and his Guardian, B. D. TARLTON, and KING RANCH, a Texas corporation,

Respondents.

PETITION FOR CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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Respondents.

PETITION FOR CERTIORARI.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Petitioners seek this court's writ of *certiorari* because the Supreme Court of Texas has explicitly refused to give full faith and credit to a prior adjudication by the United States Court of Appeals for the Fifth Circuit in *Atwood*

v. *Kleberg,* 135 F. (2d) 452 (opinion reprinted in full, Appendix III, *post,* pp. 60 to 62) that two oil and gas leases upon petitioners' (Atwoods') minerals were

> "an incident to and a part of the consideration for a loan or mortgage secured under difficult and trying conditions to save the estate and made under the express authority given in the will to borrow and mortgage the property,"

has treated the leases as an absolute grant or conveyance of petitioners' mineral rights having an admitted value of seventeen million dollars, and has therefore denied both of petitioners alternative claims (1) that the leases should either be deemed usurious consideration for the mortgage to which the United States Court of Appeals held that it was an incident, or (2) that petitioners should be allowed to treat the leases as a mortgage and to redeem therefrom.

In expressly refusing to consider petitioners' claims founded upon this judgment, to which Humble Oil & Refining Company was a party, the Supreme Court of Texas has decided an important question as to the effect, or lack of effect, of judgments of United States Courts as muniments of title to Texas real estate.

The question stated above emerges from and is delineated by the following facts, all of which appear from the companion opinions cited in the margin[1] and printed as appendices to this Petition and Brief and none of which are disputed:

The property involved is part of what is known as the King Ranch.

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[1] **Humble Oil & Refining Company v. Fisher,** 253 S.W. (2d) 656 (Appendix I); **Humble Oil & Refining Company v. Atwood,** 244 S.W. (2d) 637 (Appendix II); **Atwood v. Kleberg,** 135 F. (2d) 452 (Appendix III).

Petitioners and the individual respondents are co-heirs of a common ancestor. Respondent HUMBLE OIL & REFINING COMPANY is the lessee under two mineral leases of petitioners' minerals which petitioners say are, under the decision of the United States Court of Appeals above referred to, either in fact and in equity a mortgage or usurious additional consideration for a mortgage upon surface lands. The Supreme Court of Texas tersely stated (but, as we shall show, explicitly declined to decide) the substantive Federal question thus:

> "This ranch was administered for a period under a trust established by an ancestor of all parties. Becoming dissatisfied with the administration of the trust, the Atwoods [petitioners here] filed and prosecuted to judgment three suits in the U. S. District Court for the Southern District of Texas, styled, respectively: *Atwood* v. *Kleberg,* Equity Action No. 74, Main Case and Ancillary, on appeal 163 F. (2d) 108; *Atwood* v. *Kleberg,* Equity Action No. 102, and *Atwood* v. *King,* Equity Action No. 101, on appeal 133 F. (2d) 69, on rehearing 135 F. (2d) 452. That portion of this Federal litigation material to this case consisted of an attack upon oil and gas leases executed by the trustees. In the Federal litigation it was determined that the minerals had not been severed prior to the creation of the trust; that the trustees had authority to execute the oil and gas leases; that the leases as executed did not violate the trustees' duty to the *cestui que trust;* and that the oil and gas leases involved here were valid.
>
> "Following these adverse decisions, the Atwoods brought this suit in the Texas courts seeking: (1) an adjudication that the oil and gas lease on that portion of the ranch partitioned to them is a mortgage, and for redemption; (2) cancellation of the oil and gas lease 'because extending 18½ years and longer beyond the end of the limited ten-year trust form'; (3) reformation; (4) an accounting; (5) damages;

(6) and general relief. The King Ranch corporation and other defendants joined Humble in resisting the attacks.

"Both sides plead *res adjudicata* and estoppel by reason of the Federal litigation and both vigorously argue that *Moore* v. *Snowball*, 98 Tex. 16, 81 S.W. 5, supports their contention. On Item (1), plaintiffs [petitioners here] contend that the debt was not finally paid until after the judgments in the Federal cases, so that the case at bar neither could nor should have been urged in that litigation. The trial court severed the issues of *res adjudicata* and estoppel and upon them rendered judgment for defendant that plaintiffs take nothing." (Appendix II, *post*, p. 43-44.)

But the opinion of the Supreme Court of Texas fails to state that petitioners also asserted that if the oil and gas leases in question were absolute grants and not mortgages, then, being additional consideration for the making of a mortgage of surface lands to the trustees, they necessarily constituted an usurious consideration, it being admitted the amount of the loan was $3,223,645.52 (Tr. 133) and that Humble has already received $17,244,623.44 (Tr. 117) in value from these leases, amounting (together with an additional 5% per annum on the money loaned) to interest at 31¾% per annum during the twenty-year period of the loan. The applicable provisions of Texas statutes defining and governing usury are set forth in the margin.[2]

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[2] "Article 5069. **Definitions.**— * * * 'Usury' is interest in excess of the amount allowed by law [10% per annum]; all contracts for usury are contrary to public policy and shall be void.

"Article 5071. **Limit on Rate.**—The parties to any written contract may agree to and stipulate for any rate of interest not exceeding ten per cent per annum on the amount of the contract; and all written contracts whatsoever, which may in any way, directly or indirectly, provide for a greater rate of interest shall be void and of no effect for the amount or value of the interest only; but the principal sum of money or value of the contract may be received and recovered."

It is an important and well settled principle of Texas substantive law that relief may not be had from usury until the principal indebtedness has been paid.[3] At the time that the Federal litigation above-mentioned was instituted by petitioners, the principal indebtedness had not been paid. Therefore, they could not have sought relief upon their claim of usury. In the Federal litigation above mentioned, petitioners contended that the leases were not authorized by the trust agreement because they were beyond the powers of the trustee and because they ran for a period longer than the trust, that they were so improvident as to be voidable even as against defendant Humble [respondent here], which knew that it was dealing with a trustee, and that they were therefore voidable at the instance of petitioners, who were *cestuis* of the trust. In deciding the foregoing issues in the Federal litigation,

[3] "Appellant would not be entitled to set aside the [mortgage] trustee's sale and deed as to lots 4 and 5, which were intended to be included in the deed of trust, because the loan contract may have been tainted with usury, unless appellant tendered or offered to pay the principal amount of the debt. Appellant had never at any time offered to pay the principal amount of the debt. **Spann v. Stern's Admrs.,** 18 Tex. 556; **Carden v. Short** (Tex. Civ. App.), 31 S.W. 246; **Hood v. People's Bldg. & Saving Ass'n,** 8 Tex. Civ. App. 385, 27 S.W. 1046; **Hemphill v. Watson,** 60 Tex. 679; 17 Tex. Jur. 46; 7 Tex. Juris. 957-961." Quoted from **Robertson v. Duncan,** 71 S.W. (2d) 597. See also **Yonack v. Emery,** 13 S.W. (2d) 667; **Shropshire v. Commerce Farm Credit Co.**, 280 S.W. 181 (Com. of App.). See also **McBroom v. Scottish Mtge. & Land Invest. Co.,** 153 U. S. 318.

The same rule, that a mortgagor may not redeem until the mortgage debt has been paid in full, likewise prevails in Texas. **Whitehead v. Fisher,** 64 Tex. 638; **Jones v. Porter,** 29 Tex. 456; **Atwood v. Humble,** 239 S.W. (2d) 412 at 415.

and as the basis therefor, the United States Court of Appeals made the following holdings material thereto:

> "The proof establishes beyond controversy that the lease was an incident to and a part of the consideration for a loan or mortgage secured under difficult and trying conditions to save the estate and made under the express authority given in the will to borrow money and mortgage the property."

Fortified with this adjudication that the leases were valid *only* because they were

> "an incident to and part of the consideration for a loan or mortgage"

and that they depended for their validity upon the trustees' power

> "to borrow money and mortgage the property",

petitioners filed in the District Court of Willacy County, Texas, a suit praying, *inter alia,* (1) that the leases either be held to have been adjudged by the United States Court of Appeals to be mortgages, with the consequent right in petitioners to redeem from them. under the principle of *res judicata,* or (2) that they be deemed usurious consideration for an accompanying mortgage and were therefore void.

The Supreme Court of Texas held, notwithstanding the prior conflicting adjudication of the United States Court of Appeals relied on by petitioners, that upon a proper exposition of the substantive law of Texas, mineral leases which entail upon the lessee the obligations of exploring and exploiting lands thought to contain minerals are not within the general rule that grants absolute on their face can be shown by parole to be mortgages in fact and in equity. Thereupon the Supreme Court of Texas explicitly refused to consider the effect of the prior judgment of the

United States Court of Appeals as a substantive muniment of title in the following language:

> "Having determined that plaintiffs plead no cause of action, it is unnecessary for us to determine whether it was, or either could or should have been adjudicated in the Federal litigation. Plaintiffs' petition is full and we do not believe that plaintiffs can add to it." (Appendix II, *post*, p. 59.)

And, as if to make assurance doubly sure that it had refused even to consider the effect of the prior Federal adjudication in its first opinion as above quoted, the Texas Supreme Court in its second opinion said of its first opinion:

> "And this Court, after discussing at length the question or questions raised by those allegations [as to redemption], fully made in the petition and constituting most of the petition, expressed the conclusion above quoted that those allegations did not state a cause of action, and that it was not necessary to determine whether the cause of action, that is the cause of action for redemption, was or could have been adjudicated in the Federal litigation." (Appendix I, *post*, p. 33-34.)

• • •

> As has been said, this Court's opinion in Cause No. A-3126 does not pass upon the question whether the alleged cause of action for redemption has been adjudicated in the Federal litigation. The opinion is expressed that it is unnecessary to do so because the plaintiffs have not pleaded and can not plead a cause of action for recovery on that ground. (Appendix I, *post*, p. 37.)

• • •

> "The decision was not that the allegations of the petition are sufficient, but that no cause of action for redemption is alleged or can be alleged. Thus the record, particularly the plaintiffs' petition, affirmatively discloses an insuperable barrier to recovery

by the plaintiffs on the right of redemption theory. (Appendix I, *post*, p. 38.)

In short, the Supreme Court of Texas has thrice held that when it determines *de novo* that plaintiffs

> "plead no cause of action it is unnecessary to determine whether it was * * * adjudicated in the Federal litigation"

or not. This is a plain statement that because the Supreme Court of Texas deemed the plaintiffs to be without substantive rights under state law, it would not even consider the contention that a United States Court of Appeals had expressly recognized the substantive rights which the plaintiffs assert as previously adjudicated in the Federal court.

As should be specially noted, the Texas trial court had severed the issues of *res judicata* from all other issues in the case. The Supreme Court of Texas therefore reversed the cause and remanded it to the trial court for the taking of an accounting.

It will be noted that since the Supreme Court of Texas reversed and remanded for further proceedings, but without deciding the effect to be given prior Federal adjudication, its judgment was not final and hence this court had no jurisdiction to review it *via certiorari* or otherwise.

Upon remandment to the trial court, petitioners, in order properly to preserve their Federal questions which were not yet ripe for this court's adjudication, propounded interrogatories and otherwise proceeded in assertion of their claim that the leases were either mortgages from which they could redeem or invalid as usurious consideration for an accompanying mortgage to which the United States Court of Appeals had held they were an incident. (Appendix III, *post*, p. 62.) Respondents sought from the Supreme Court of Texas a writ of prohibition.

The Supreme Court of Texas has granted the writ of prohibition and has thereby foreclosed petitioners from further asserting and thereby preserving for this court's review their contention that the Supreme Court of Texas denied a substantive Federal right when it refused to give effect to the prior adjudication of the United States Court of Appeals that the leases in question were additional consideration for a mortgage, in which case they were necessarily usurious or a mortgage from which petitioners may redeem. It will again be noted that the petitioners could not have sought relief from usury in the United States Court of Appeals because they had not at that time paid the principal and under the Texas law cited *ante*, no question of usury can be entertained until the principal is paid. Likewise the petitioners could not have sought redemption in the prior Federal litigation, because the mortgage debt had not been paid and no right to redeem existed until it was paid.

Petitioners therefore maintain that the Supreme Court of Texas has

(1) refused to give full faith and credit to the prior judgment of the United States Court of Appeals as an adjudication that the leases in question (though ordinary mineral leases in form) were in reality either merely mortgage liens upon petitioners' minerals or usurious consideration for a mortgage; and

(2) has frustrated by its writ of prohibition petitioners' right to save and preserve in the Texas litigation their claims under the prior Federal judgment,

wherefore the Texas Supreme Court's issuance of its writ of prohibition, confirmed by denial of petitioners' application for rehearing, has finally adjudicated adversely to and has taken from petitioners a substantive property

right founded upon a prior judgment of a United States Court of Appeals as a muniment of title.[4]

The Supreme Court of Texas has therefore decided an important question as to the effect, or lack of effect, upon Texas titles of a prior adjudication of United States courts.

Stated even more concisely, the question is which is paramount: (a) the prior Federal judgment of the United States Court of Appeals, or (b) the later State judgment of the Supreme Court of Texas, both determinative of a question of Texas land-title law in relation to mortgages and usury. The federal question is NOT which court decided this question of local law correctly. The federal question is whether the Supreme Court of Texas was compelled to follow, because it was bound by, the prior Federal judgment *even if erroneous,* or at least to give consideration to the prior Federal judgment. This court is the only court which can settle this federal question.

The Supreme Court of Texas, either ignoring the Federal judgment, or disagreeing with it, has refused even to consider the prior Federal judgment, has refused to carry it into effect, has rendered a contrary State judgment, and has issued a writ of prohibition preventing the proponents of the Federal judgment (petitioners) from entering the State courts of Texas to prove both its rendition and effect, thereby foreclosing petitioners from

[4] It was a muniment of title because a mortgagor retains title to all property conveyed as "an incident to and part of the consideration for a loan or mortgage", the mortgagee receiving merely a lien under Texas law (**Humble Oil & Refining Co. v. Atwood,** 244 S.W. (2d) 637. Appendix II, post p. 49), and because a borrower has the right to invalidate a conveyance constituting usurious interest under the Texas statute, cited **ante** (footnote, p. 4).

ultimately reaching this court *via certiorari,* where alone the federal question can be determined and settled.

Basis upon which it is contended that this court has jurisdiction to review the judgment in question.

Jurisdiction is invoked under the Act of Congress of June 25, 1948, c. 646, 62 Stat. 928; U.S.C.A. Title 28, Sec. 1257.

The opinion of the Supreme Court of Texas became final by denial of petition for rehearing on the 21st day of January, 1953, and within ninety days prior to the filing of this Petition.

THE QUESTIONS PRESENTED.

The questions presented are:

1. **Did the Texas Supreme Court's holding that "having determined that the plaintiffs plead no cause of action, it is unnecessary for us to determine whether it was * * * adjudicated in the federal litigation" deny to petitioners substantive property rights founded upon a prior judgment of a United States court as a muniment of title?**
2. **Did the Texas Supreme Court deny full faith and credit to the prior judgment of the United States Court of Appeals?**
3. **Did the Texas Supreme Court's writ of prohibition deny petitioners' procedural due process by summarily inhibiting them from preserving in the Texas courts their claims of federal right for ultimate presentation to this court via certiorari?**

REASONS RELIED UPON FOR GRANTING OF THE WRIT.

(1) The Supreme Court of Texas has held that there was a prior adjudication by the United States Court of Appeals that a mineral lease "was an incident to and a part of a consideration for a loan or a mortgage" and that it depended for its validity upon "the express authority given in the will to borrow money and mortgage the property." Since the United States Court of Appeals held that this was the tenor and import of the lease, petitioners are entitled to have this court decide *via certiorari* whether it was compulsory upon the Texas Supreme Court to give full faith and credit to the prior Federal judgment and to hold that it was necessarily either a part of the mortgage to which it was incident, in which case the petitioners cannot be deprived of the right to redeem from it, or whether it was usurious consideration for that mortgage, in which case it was void.

The Supreme Court of Texas did *not* give full faith and credit to the prior judgment of the United States Court of Appeals and then deduce consequences from that effect within a debatable realm of Texas law. On the contrary, it determined *de novo* and thrice repeated that the plaintiffs had pleaded no cause of action for redemption, and could plead none, wherefore it said that "it is unnecessary for us to determine whether it" (the alleged cause of action) "was * * * adjudicated in the Federal litigation." Thus the Supreme Court of Texas explicitly refused to ascertain whether the plaintiffs had recovered a judgment conclusively adjudicating the merit of the claim which they asserted in the Texas courts.

In thus holding, the Supreme Court of Texas has decided an important question as to the effect of judgments

of the United States Courts as muniments of title to Texas lands.

The Supreme Court of Texas has therefore decided an important question of substance which ought to be decided by this court.

(2) The Supreme Court of Texas also failed and refused to give full faith and credit to the prior Federal judgment of the United States Court of Appeals that the mineral leases were part of the consideration for a loan or mortgage, which consideration was sufficient to render such leases void for usury under the Texas statute.

In thus holding, the Supreme Court of Texas has decided an important question as to the effect of Federal Judgments of the United States Court of Appeals as muniments of title to Texas lands.

The Supreme Court of Texas has therefore decided an important question of substance which ought to be decided by this court.

(3) The Supreme Court of Texas remanded petitioners' original suit in the Texas courts for further proceedings. When petitioners sought to preserve their claims of Federal rights in the lower courts, the Supreme Court of Texas inhibited that assertion by a writ of prohibition. This summary use of prerogative process amounted to a denial of petitioners' right to assert, in order to preserve and protect for this court's review, their important and substantial Federal claims.

Therefore this case presents questions of sufficient merit and importance to elicit this court's writ of *certiorari*.

PRAYER FOR PETITION FOR WRIT OF CERTIORARI.

Wherefore, petitioners pray for the issuance of this court's writ of *certiorari* to review and reverse the judgment of the Supreme Court of Texas in *Humble Oil & Refining Company* v. *Fisher* (Appendix I, *post,* p. 41-42), to the end that petitioners' Federal rights herein claimed may be effectuated.

Edwin K. Atwood, Alice B. Atwood, Bascom Cox, Fred B. Wagner, John Q. Adams, E. Wayne Wilson, Thomas Hart Fisher, *Petitioners,*

By .....
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Respondents.

BRIEF IN SUPPORT OF THE PETITION.

The Opinions Below.

The opinion of the Supreme Court of Texas in *Humble Oil & Refining Company* v. *Fisher,* which is the opinion directing issuance of that court's writ of prohibition, is reported in full in 253 S.W. (2d) 656, and is reprinted as Appendix I, *post,* p. 29-42.

The opinion of the Supreme Court of Texas in *Humble Oil & Refining Company* v. *Atwood,* which is the opinion rendered final by the issuance of the Supreme Court's writ of prohibition in *Humble Oil Company* v. *Fisher,* is re-

ported in 244 S. W. (2d) 637, and is reprinted as Appendix II, *post,* p. 43-59.

The opinion of the United States Court of Appeals for the Fifth Circuit in *Atwood* v. *Kleberg,* which is the prior opinion relied upon as *res judicata* and as an embodiment of petitioner's Federal rights, is reported in *Atwood* v. *Kleberg,* 135 F. (2d) 452, and is reprinted as Appendix III, *post,* p. 60-62.

This Court's Jurisdiction.

This Court has jurisdiction to review the judgment in question under section 1257 of the Judicial Code (Title 28, U.S.C.A. sec. 1257).

Rehearing in this cause was denied on January 21, 1953, and within ninety days of the filing of this Brief.

The Questions Presented.

The questions presented, stated in the Petition for *Certiorari* and repeated here for this Court's convenience, are:

1. **Did the Texas Supreme Court's holding that "having determined that the plaintiffs plead no cause of action, it is unnecessary for us to determine whether it was * * * adjudicated in the federal litigation" deny to petitioners substantive property rights founded upon a prior judgment of a United States court as a muniment of title?**
2. **Did the Texas Supreme Court deny full faith and credit to the prior judgment of the United States Court of Appeals?**
3. **Did the Texas Supreme Court's writ of prohibition deny petitioners' procedural due process by summarily inhibiting them from preserving in the Texas courts their claims of federal right for ultimate presentation to this court via certiorari?**

Statement of the Facts.

The Summary Statement of the Matter Involved in the Petition is sufficient to delineate the Federal questions sought to be presented and to emphasize their moment. However, once the nature and importance of the case is appreciated, the exigent facts can be better understood by the following *resume* of the undisputed matters appearing from the opinions printed in the Appendices:

Petitioners and the individual respondents are co-heirs of a common ancestor who by her will established a trust with the King Ranch, its latent mineral resources and appurtenances, as the corpus. The testamentary trustees were directed to pay the debts of the testatrix.

The trustees encumbered the corpus of the trust with a mortgage on the surface lands to secure indebtedness which would not mature until some eighteen years after the termination of the ten-year period of the trust. Contemporaneously with the execution of this mortgage on surface lands, the trustees executed two separate instruments which have been consistently treated by all parties as integrated and as though they were embodied in a single document and which are referred to as a "mineral lease" of the oil and gas under the surface.

Petitioners attacked this lease in the case of *Atwood* v. *Humble Oil & Refining Company* in a United States District Court for the Southern District of Texas. In this litigation petitioners asserted that the lease was void because (1) the trustees were not authorized to make it under the powers granted them in the will, (2) by its terms, it was to run for a longer period than the ten-year term of the trust, and (3) the lease was so improvident as to be voidable not only as against the trustees but as against respondent Humble Oil & Refining Company under the doctrine that one who knows he is dealing with trustees

cannot profit by a transaction which upon its face is so unfair as to constitute a breach of trust.

The District Court and the United States Court of Appeals held that the trustees were authorized to make the lease within the powers granted them in the will. *Atwood* v. *Kleberg*, 135 F. (2d) 452.

In order to decide the issues raised by petitioners' contentions that the lease was void because the trustees were not authorized to make it under the powers granted them in the will, because it was to run for a longer period than the term of the trust and because it was patently unfair, the United States Court of Appeals as the basis for its adjudication made the material holding that the lease in question was valid because it was

> "an incident to and a part of the consideration for a loan or mortgage secured under difficult and trying conditions to save the estate and made under the express authority given in the will to borrow money and mortgage the property".

Now the crux of this case, so far as the Federal questions tendered are concerned, is this:

Since the United States Court of Appeals held as the basis of its adjudication sustaining the validity of the lease against petitioners' attack as aforesaid, that it was "additional consideration" for the mortgage on the surface lands to which it was "an incident", the lease necessarily constituted usurious consideration for the mortgage. This is evident from the fact that the indebtedness secured by the mortgage was only $3,223,645.52 (Tr. 133), while the value of the leasehold interests alone was admittedly over $17,000,000. (Tr. 117) *But under the principle of Texas law mentioned in the Petition, petitioners could not seek relief from these usurious and voidable obligations until the principal debt had been paid, which, at*

the time of the prior Federal litigation it had not. Similarly, if the lease was "additional consideration" for the mortgage, it necessarily left the title to the minerals in the mortgagor, subject only to a lien in the mortgagee to secure the mortgage debt, and therefore subject to redemption. Likewise petitioners could not and were not bound to redeem from the lease at that time because the debt had neither matured nor been paid.

But the principal indebtedness was later paid in full.

Not until the principal indebtedness was paid in full were petitioners entitled under Texas law to assert either that the lease was security for a mortgage or the usurious character of the mortgage, and to seek relief therefrom.

Accordingly petitioners (having paid the debt) instituted in the District Court of Texas for Willacy County a suit, alternatively, to redeem from the lease as a mortgage or to have it declared wholly void as usurious consideration for the mortgage on the surface lands to which the United States Court of Appeals had held that it was an incident.

In the Texas District Court, petitioners relied upon the prior adjudication of the United States Court of Appeals as conclusive under the doctrine of *res judicata* that the lease was additional consideration for the mortgage. This being so, it necessarily followed that it was usurious unless it was itself a mortgage, in which case petitioners had the right to redeem.

The Supreme Court of Texas thrice explicitly refused to entertain this important question of the effect of the prior adjudication of the United States Court of Appeals as a muniment of title. The Supreme Court of Texas said in *Humble Oil & Refining Company* v. *Atwood*, (Appendix II, *post*, p. 59):

> "Having determined that plaintiffs plead no cause of action, it was unnecessary for us to determine

whether it was, or either could or should have been adjudicated in the Federal litigation. Plaintiffs' petition is full and we do not believe that plaintiffs can add to it."

The foregoing refusal even to consider the effect of the prior Federal adjudication was thrice repeated by the Texas Supreme Court. Speaking of its first opinion (Appendix II), it said in its second opinion (Appendix I):

> "And this Court, after discussing at length the question or questions raised by those allegations [as to redemption], fully made in the petition and constituting most of the petition, expressed the conclusion above quoted that those allegations did not state a cause of action, and that it was not necessary to determine whether the cause of action, that is the cause of action for redemption, was or could have been adjudicated in the Federal litigation." (Appendix I, *post,* p. 33-34.)
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> As has been said, this Court's opinion in Cause No. A-3126 does not pass upon the question whether the alleged cause of action for redemption has been adjudicated in the Federal litigation. The opinion is expressed that it is unnecessary to do so because the plaintiffs have not pleaded and can not plead a cause of action for recovery on that ground. (Appendix I, *post,* p. 37.)
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> "The decision was not that the allegations of the petition are sufficient, but that no cause of action for redemption is alleged or can be alleged. Thus the record, particularly the plaintiffs' petition, affirmatively discloses an insuperable barrier to recovery by the plaintiffs on the right of redemption theory." (Appendix I, *post,* p. 38.)

In short, the Supreme Court of Texas has thrice held that it did not reach the Federal question because petitioners had pleaded no cause of action *although the ques-*

tion whether they had in fact pleaded a cause of action depended upon the effect of the Federal adjudication which the Supreme Court of Texas refused to consider. In other words, the Supreme Court of Texas begged the Federal question. If the Federal question was answered in the affirmative petitioners *necessarily* pleaded a cause of action.

The Supreme Court of Texas reversed and remanded for further proceedings, *without deciding the res judicata issue upon which petitioners' claims of Federal right depend.* Hence petitioners could not have sought *certiorari* from that decision.

When petitioners returned to the lower court and sought to preserve for review their Federal questions by appropriate proceedings in that court, including interrogatories, the Supreme Court of Texas in a proceeding independent in title and form but actually a continuation of this litigation, categorically and peremptorily interdicted the continuation of those proceedings by issuance of its prerogative and highly summary writ of prohibition.

Thus the judgment awarding the writ of prohibition by the final judgment of the Supreme Court of Texas terminated, except for recourse to this Court, the litigation upon the federal question involved.

ARGUMENT.

I.

The judgment of the United States Court of Appeals was entitled to full faith and credit in the courts of Texas.

There is no doubt whatever that judgments of United States Courts are entitled to full faith and credit in state courts. In *Knights of Pythias* v. *Meyer,* 265 U.S. 30, this court said at page 33:

> "While the judicial proceedings of the Federal courts are not within the terms of the constitutional provision, such proceedings, nevertheless, must be accorded the same full faith and credit by state courts as would be required in respect of the judicial proceedings of another state. *Hancock Nat. Bank* v. *Farnum,* 176 U.S. 640, 644, 44 L. Ed. 619, 621, 20 Sup. Ct. Rep. 506; *Embry* v. *Palmer,* 107 U.S. 3, 9, 27 L. ed. 346, 348, 2 Sup. Ct. Rep. 25."

In *Hancock Nat. Bank* v. *Farnum,* 176 U.S. 640, this court said at page 645:

> "The fact that this judgment was rendered in a court of the United States, sitting within the State of Kansas, instead of one of the state courts, is immaterial"

so far as the matter of full faith and credit was concerned.

In *Stoll* v. *Gottlieb,* 305 U.S. 165, this court, relative to the "full faith and credit" clause in Section 1738 (formerly Section 687) of the Judicial Code, said at page 170:

> "Under it [U.S.C.A, prior Section 687, now Section 1738] the judgments and decrees of the Federal courts in a state are declared to have the same dignity in the courts of that state as those of its own courts in a like case and under similar circumstances."

There is equally no doubt whatever that the failure of a State Supreme Court to give full faith and credit to prior

judgments of the United States courts raises a Federal question. In *Toucey* v. *New York Life Insurance Company,* 314 U.S. 118, this court said at page 129 (footnote):

> "Pleading a federal decree as res judicata in a state suit raises a federal question reviewable in this [United States Supreme] court . . ."

In *Des Moines Navigation & R.R. Co.* v. *Iowa Homestead Co.,* 123 U.S. 552, in considerating the *res judicata* effect in a state court of a prior Federal judgment, this court said at page 556:

> "As [res judicata] was *the* defense in this case, . . . we cannot decide that the [state] court was justified in holding that it could not be determined. Such action was, in our opinion, equivalent to a decision against the federal right which was actually set up and claimed; and thus our jurisdiction for the review of the judgment on this question, as well as the others, is complete."

The correctness or incorrectness of the adjudication of the United States Court of Appeals is not determinative of the effect to be given it in the State courts of Texas. We do not concede that it was erroneous. On the contrary, this adjudication was assumedly correct. The Supreme Court of Texas accepted it as correct (Appendix II, *post,* p. 59). But, whether right or wrong, it must be given full faith and credit in the Texas courts. This court said in *Reed* v. *Allen,* 286 U.S. 191 at page 201:

> "These decisions constitute applications of the general and well settled rule that a judgment, not set aside on appeal or otherwise, is equally effective as an estoppel upon the points decided whether the decision be right or wrong. *Cornett* v. *Williams,* 20 Wall. 226, 249, 250, 22 L.ed. 254, 258, 259; *Wilson* v. *Deen,* 121 U.S. 525, 534, 30 L.ed. 980; *Chicago R.I.& P.R. Co.* v. *Schendel,* 270 U.S. 611, 617, 70 L.ed. 757, 762. The indulgence of a contrary view would result in creating elements of uncertainty and confusion and in

undermining the conclusive character of judgments, consequences which it was the very purpose of the doctrine of *res judicata* to avert."

The United States Court of Appeals' adjudication, which must be deemed correct, affirmed petitioners' title to the minerals as subject merely to a mortgage lien, and also affirmed petitioners' right to avoid the mineral lease as usurious interest, and the Texas Supreme Court had thereafter no authority to nullify petitioners' property rights by refusing the remedy of redemption, and the remedy of avoidance for usury.

By refusing both of these remedies, the Supreme Court of Texas confiscated the property rights assured to petitioners by the prior judgment of the United States Court of Appeals.

A mortgage without a right of redemption is not a mortgage at all. And under Texas law, a contract adjudged to be usurious consideration is necessarily adjudged to be subject to nullification and avoidance. All that is postponed by such an adjudication is the accrual of the right of redemption and the right to avoid the lease as usurious consideration until the mortgage debt is paid in full.

It is to be borne in mind that the Federal judgment upon which petitioners rely was rendered by the United States Court of Appeals for the Fifth Circuit and affirmed a decree entered in a diversity case by the United States District Court for the Southern District of Texas within which the minerals were situated. Accordingly, full faith and credit and *res judicata* effect cannot be denied to the Federal judgment on any theory that it was made by a foreign court in regard to land outside of its territorial jurisdiction. The Federal courts here involved were acting "in the exercise of jurisdiction to administer the laws

of the State [of Texas]." See *Dupasseur* v. *Rochereau,* 88 U.S. 130. See also *Dowell* v. *Applegate,* 152 U.S. 327; *Deposit Bank* v. *Frankfort,* 191 U.S. 499, and *Metcalf* v. *Watertown,* 153 U.S. 671, which cites with approval (p. 680) the statement by the Wisconsin Supreme Court in *Ballin* v. *Friend Lace Importing Co.,* 78 Wis. 404, that:

> "The United States courts are not foreign within the state where they are held."

Thus the judgments of Federal courts in Texas relating to Texas land titles are domestic judgments entitled to full faith and credit in the State courts of Texas.

II.

The Supreme Court of Texas has denied full faith and credit to the judgment of the United States Court of Appeals in Atwood v. Kleberg, 135 F. (2d) 452.

That the Supreme Court of Texas denied full faith and credit to the decision of the United States Court of Appeals in *Atwood* v. *Kleberg,* 135 F. (2d) 452, is conclusively demonstrated by the following very brief considerations:

When petitioners brought suit in the United States District Court to invalidate the lease in question, the United States Court of Appeals as a basis for its adjudication made the material holding upon the issues presented that the lease was valid although it ran beyond the fixed time of the trust because it was "additional consideration for" a mortgage on surface lands to which it was "an incident", its execution being within the trustees' powers "under the express authority given in the will to borrow money and mortgage the property."

If this was so, then the lease was necessarily either itself a mortgage, in which case petitioners could redeem from

it, or if it was not a mortgage, it was usurious, in which case it was void.

But when petitioners asserted the judgment of the United States Court of Appeals as a conclusive adjudication that the lease was additional usurious consideration for a mortgage or itself a mortgage, the Supreme Court of Texas begged the question of former adjudication by determining *de novo* and thrice repeating that no cause of action was pleaded.

Of course, if the judgment of the United States Court of Appeals meant what it says, plaintiffs *necessarily* pleaded a cause of action for redemption and usury.

Thus the Supreme Court of Texas has failed to give full faith and credit to a prior judgment of a United States Court as a muniment of title and has thereby precipitated a very serious and important question as to the effect of Federal judgments on title in the State of Texas.

III.

The Texas Supreme Court's writ of prohibition in Humble Oil & Refining Company v. Fisher, 253 S.W. (2d) 656 (Appendix I) frustrated Petitioners' preservation of their claims of Federal rights in the companion case of Humble Oil & Refining Company v. Atwood, 244 S.W. (2d) 637 (Appendix II).

The judgment of the Supreme Court of Texas in *Humble Oil & Refining Company* v. *Atwood* (Appendix II, *post,* p. 59) reversed and remanded the cause for further proceedings, *without deciding the res judicata issue upon which petitioners' claims of Federal right depend.* It therefore was not at that time a final adjudication of petitioner's Federal right and could not become a final judgment until such further proceedings should be terminated.

But when the Supreme Court of Texas issued its writ of prohibition in *Humble Oil & Refining Company* v. *Fisher* (Appendix I), that court made it impossible and therefore made it unnecessary for petitioners to take any further steps to preserve petitioners' claims of Federal right in the Texas courts.

That the judgment of the Texas Supreme Court in *Humble Oil & Refining Company* v. *Atwood* was not final until petitioners had returned to the trial court and prosecuted a second appeal is very clear from this court's language in *Parker* v. *Illinois,* 333 U.S. 571, at page 576:

> "We find it no more unreasonable for Illinois to require a second appeal than for this Court to do so, as it does when it refuses to review the judgment of a lower state court absent a second appeal to the highest court of the State, though that be a mere formality because governed by the law of the case established in an earlier appeal. *McComb* v. *Commissioners of Know County,* 91 U.S. 1; *Great Western Telegraph Co.* v. *Burnham,* 162 U.S. 339."

When, therefore, the Texas Supreme Court's writ of prohibition in the *Fisher* case categorically interdicted further prosecution of the *Atwood* case in obedience to the Texas Supreme Court's mandate in that (the *Atwood*) case, it not only finally confirmed its previous refusal to entertain petitioners' claims of rights under a prior Federal judgment but used the prerogative writ of prohibition to prevent petitioners from preserving those claims for review by this court.

The Supreme Court of Texas has explicitly refused even to consider, much less has it given full faith and credit to, the prior Federal adjudication that petitioners are owners of the minerals that are the subject matter of this case. The Federal adjudication, even if erroneous, confirmed in petitioners and itself constituted a valuable property right. Thereafter the Supreme Court of Texas

had no authority to nullify petitioners' property rights by refusing the remedy of redemption, and the remedy of avoidance for usury. When petitioners sought to preserve their assertion of Federal rights in the lower court, the Supreme Court of Texas forbade such assertion by its summary writ of prohibition.

We submit that this case should call for this court's writ of *certiorari.*

CONCLUSION.

For reasons apparent upon the record, asserted in the petition for *certiorari* and urged in this Brief, it is respectfully submitted that this court should grant *certiorari* to review and reverse the judgment of the Texas Supreme Court in *Humble Oil & Refining Company* v. *Fisher* (Appendix I, *post,* p. 41-42), to the end that petitioners' Federal rights herein claimed may be effectuated.

Respectfully submitted,

WILLIAM C. WINES,
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Attorneys for Petitioners.

APPENDIX I.

IN THE SUPREME COURT OF TEXAS
Humble Oil & Refining Company v. *Fisher,*
253 S.W. (2d) 656.

ORIGINAL PROCEEDING FOR WRIT OF PROHIBITION.

Relator, Humble Oil & Refining Company, which was petitioner in Cause No. A-3126 decided by this Court on October 31, 1951, seeks to have a writ of prohibition issued against respondents, Edwin K. Atwood and Alice B. Atwood, who were the respondents in that cause, and against Thomas Hart Fisher and others, who were their attorneys, to prohibit respondents from attempting by pleading filed or otherwise to cause to be tried in the District Court of Willacy County or in any other Texas Court issues which were decided and concluded by this Court's judgment. The two judges of the district courts of Willacy County are also named as respondents herein, but for brevity the respondents other than the two judges are referred to as respondents.

The substance of the allegations of relator's petition is: that since the rendition of this Court's final judgment respondents have filed in Cause No. 1539 in the 103rd District Court of Willacy County, which rendered the final judgment later affirmed by this Court's judgment in Cause No. A-3126, a written demand for a jury "for the trial of all issues of fact, and of each and every issue of fact, raised by the pleadings in said cause"; that respondents have also filed in said cause in the district court 159 written interrogatories to be answered by several of the officers of relator, the Humble

Oil & Refining Company; and that they have also filed in said cause in district court a request for the admission of facts and genuineness of documents set out and designated in 102 numbered paragraphs. It is further alleged in the petition that the written demand for jury trial, the interrogatories and the request for admissions disclose an intention on the part of respondents to ignore this Court's judgment and to demand a trial of issues foreclosed by the judgment, and that the interrogatories filed and the admissions sought deal only with issues foreclosed by the judgment and are relevant to them and are neither relevant nor pertinent to the issue of accounting, the sole issue which the trial court under this Court's judgment is authorized to try and determine.

Respondents have filed a full answer supported by brief. They admit the filing of the written demand for jury, the interrogatories and the request for admissions, and admit further that many of the interrogatories and requests for admissions are relevant to other issues than that of accounting. The position taken by respondents in their answer and brief is, stated generally: that only the issues of *res judicata* and estoppel have been tried in the district court, and that respondents have the right to a trial in district court upon the merits of all of the issues pleaded in their First Amended Original Petition filed in Cause No. 1539; that this Court did not determine and had no jurisdiction to determine in Cause No. A-3126 the merits of any of the issues properly pleaded in respondents' petition other than the separately tried issues of res judicata and estoppel; and that had this Court undertaken to determine any of those other issues it would have deprived the respondents of their constitutional rights to their "day in court" and to a jury trial.

All of respondents' First Amended Original Petition filed in Cause No. 1539, except several comparatively brief paragraphs alleged as alternative pleadings attacking the oil and gas leases involved herein as invalid and subject to cancellation or reformation on several grounds, is devoted to allegations attempting to show that the two oil and gas leases were executed as security for repayment of a loan made by relator, and that respondents Edwin K. Atwood and Alice B. Atwood are entitled to a right of redemption, the debt having been paid, and to judgment removing the oil and gas leases as clouds on their title.

In Cause No. 1539 in the district court of Willacy County relator Humble Oil & Refining Company and other defendants pleaded in bar as *res judicata* of all of the issues raised in the First Amended Original Petition judgments which had theretofore been rendered in three suits brought by respondents Edwin K. Atwood and Alice B. Atwood in the United States District Court. The district court of Willacy County entered an order that issues of *res judicata* and estoppel be tried first and separately from the trial on the merits, proceeded to hear evidence on those issues, and rendered final judgment sustaining the defendants' plea of *res judicata,* and ordered and adjudged that Edwin K. Atwood and Alice B. Atwood, respondents herein, "are not entitled to any of the relief sought by them in this suit, and that such relief be and the same is hereby denied."

On appeal to the Court of Civil Appeals that Court held that the judgments of the United States District Court were not conclusive of the question as to mortgage and the right to redeem, reversed the trial court's judgment, and remanded the cause for trial on the merits. 239 S. W. 2d 412.

After the granting by this Court of writ of error and the submission of the cause as Cause No. A-3126, final judg-

ment was rendered therein on October 31, 1951, described thus in this Court's opinion:

> "Accordingly, the judgment of the Court of Civil Appeals is reversed and the judgment of the trial court that plaintiffs take nothing is affirmed without prejudice to plaintiffs' right to an accounting for any money which may be due them as royalty owners under the oil and gas lease. Since plaintiffs prayed for an accounting and that portion of the case was severed before appeal, the trial court may proceed with that portion of the case, but only for the purpose of an accounting." *Humble Oil & Refining Company* v. *Atwood*, 244 S.W. 2d 637, 645.

The judgment rendered and entered on the minutes was in these terms:

> "It is therefore Ordered, Adjudged and Decreed that the judgment of the Court of Civil Appeals be reversed, and the judgment of the District Court decreeing that plaintiffs (respondents here) take nothing by their suit be in all things affirmed; without prejudice, however, to the said plaintiffs' right to an accounting for any money which may be due them as royalty owners under the oil and gas lease.
>
> "It is further ordered that since plaintiffs below prayed for an accounting and that portion of the case was severed before appeal, the trial court may proceed with that portion of the case, but only for the purpose of an accounting."

Except for what is said in this Court's opinion with reference to the issues as to mortgage and the right to redeem, and excepting the issue of accounting for royalty, the meaning and effect of the judgment and opinion in Cause No. A-3126 are that the Court approved the trial court's judgment that the plea of *res judicata* interposed by relator Humble Oil & Refining Company, and which was directed to all issues raised by the plaintiffs' First Amended Petition, should be sustained, and that this Court affirmed

the judgment of the trial court, which was that, in view of the sustaining of the plea of *res judicata,* the plaintiffs were not entitled to any of the relief sought by them in the suit, and that all of the relief sought should be denied.

Such a judgment denying to a plaintiff the relief sought by his petition because the issues have been concluded against him by final judgments theretofore rendered is not the denial of a "day in court", nor does it deprive the plaintiff of the right to trial by jury, nor can it correctly be said, as respondents argue, that the issues raised by the petition have never been determined in trial court. The adjudication by the trial court is that they have once before been tried and finally determined.

A great part of the argument in respondents' brief rests upon an erroneous construction of this Court's opinion in Cause No. A-3126. It is several times asserted in the brief that nowhere did the Court pass upon the question or questions of *res judicata.* This assumption on the part of respondents seems to be predicated in part at least on these statements in the opinion: "Having determined that plaintiffs plead no cause of action, it is unnecessary for us to determine whether it was, or either could or should have been adjudicated in the Federal litigation. Plaintiffs' petition is full and we do not believe that plaintiffs can add to it." Most of the opinion (and the same is true of the opinion of the Court of Civil Appeals and of the briefs of the parties in that Court and in this Court) was devoted to a discussion of the cause of action for redemption attempted to be alleged by respondents. And this Court, after discussing at length the question or questions raised by those allegations, fully made in the petition and constituting most of the petition, expressed the conclusion above quoted that those allegations did not state a cause of action, and that it was not necessary to determine whether the cause

of action, that is the cause of action for redemption, was or could have been adjudicated in the Federal litigation.

Near the beginning of the opinion the purposes of respondents', the Atwoods', suit and the relief sought are thus stated:

> "(1) an adjudication that the oil and gas lease on that portion of the ranch partitioned to them is a mortgage, and for redemption; (2) cancellation of the oil and gas lease 'because extending 18½ years and longer beyond the end of a limited ten-year trust form;' (3) reformation; (4) an accounting; (5) damages; (6) and general relief."

After brief reference to what was held by the Court of Civil Appeals, the opinion contains the following paragraph:

> "Items (2) and (3) above were determined against plaintiffs in *Atwood* v. *Kleberg,* 133 F. 2d 69, and we do not pass upon them other than to hold that they were there decided. Since we have determined that no cause of action is asserted in Item (1), plaintiffs are not entitled to either damages or general relief under Items (5) and (6)."

This is a brief but pointed ruling approving and affirming the decision of the district court that the alternative allegations for cancellation and reformation in the First Amended Original Petition of respondents, the Atwoods, who were the plaintiffs in the trial court, were finally adjudged against the plaintiffs by the United States District Court. The paragraph last quoted also shows this Court's disposition of the plaintiffs' claims for damages and general relief as falling with the failure of the plaintiffs to allege a cause of action for redemption.

The statement of the grounds of recovery alleged by respondents, the Atwoods, in their petition in Cause No. 1539 as set out in this Court's opinion and above quoted,

is substantially the same as the statement made of the purposes and grounds of the suit in the very beginning of the First Amended Original Petition in that cause. In the answer and brief in this cause, however, respondents emphasize usury as a ground alleged by them for avoidance of the leases, and insist that the issue of usury has never been determined either in the trial court or in this Court. The petition in the trial court, however, contains no distinct or particular allegations of usury as a ground for avoiding the leases. The twenty-third paragraph of the petition contains the following:

> "* * * then and in that event, and only in that event, plaintiffs allege and say that said entire transaction was void for usury and that said two oil, gas and mineral leases dated September 26, 1933 constituted a breach of the trust under Mrs. King's Will and were invalid and beyond the powers of Mrs. King's Trustees for lack of adequate consideration paid or to be paid by Humble to Mrs. King's Trustees or to their successors in interest, including plaintiffs, and should therefore be cancelled, set aside and held for naught; and if not cancelled and decreed to be null and void for lack of adequate consideration, said lease should be reformed as hereinafter alleged and prayed."

These allegations are followed in the same paragraph by averments that the lessors did not receive for the leases the bonus that would have represented their fair market value, that the leases did not provide for adequate rentals, and that the plaintiffs are therefore entitled to a cancellation or reformatien of the leases and to an accounting and money damages suffered by reason of the inadequacy of the consideration, and that the defendant, Humble Oil & Refining Company, should be ordered to pay to the plaintiffs an adequate consideration and additional rentals, and that the leases should be reformed in other respects. Thus it is apparent that the averment of usury

avoiding the leases is a conclusion in most general terms, with no allegations of facts supporting the conclusion that the transaction was void for usury, and further that the conclusion about usury is a part of a general attack on the leases to cancel them or to reform them by reason of inadequacy of consideration or unreasonable terms, all of the allegations of fact in this paragraph relating to the consideration and the terms of the leases of which complaint is made.

If, however, the conclusion that "the entire transaction was void for usury" can be considered as alleging a separate issue or ground for avoiding the leases, and should have been so treated by the opinion in Cause No. A-3126, the issue was adjudged adversely to respondents, the Atwoods, in Cause No. 101 in Equity in the United States District Court, and that it was so adjudged is the meaning of this Court's judgment in Cause No. A-3126, even though usury as a separate issue or ground for recovery was not referred to in the opinion. This Court's judgment, except for the issue of redemption and the question of accounting for royalty, affirmed the trial court's judgment that the plaintiffs "are not entitled to any of the relief sought by them in this suit, and that such relief be and the same is hereby denied." We believe it clearly appears from the opinion and judgment of this Court and from the entire record that the affirmance by this Court of the trial court's judgment was, with the two exceptions mentioned above, a final decision that all of the issues raised by the petition had been adjudged against petitioners, the Atwoods, by the Federal court judgments.

It may be added, referring again to respondents' contention that the question of invalidity of the leases for usury has never been tried, that in their pleadings in Cause No. 101 in Equity in the United States District Court re-

spondents, the Atwoods, alleged that the effect of the transactions between the King Estate and the Humble Oil & Refining Company was to purport to grant the exclusive rights set forth in the oil and gas leases "without any consideration whatever, the excessive interest rate charged upon said loans completely nullifying all consideration for said leases."

As has been said, this Court's opinion in Cause No. A-3126 does not pass upon the question whether the alleged cause of action for redemption has been adjudicated in the Federal litigation. The opinion is expressed that it is unnecessary to do so because the plaintiffs have not pleaded and can not plead a cause of action for recovery on that ground.

The plaintiffs' petition in Cause No. 1539 in the district court covers many pages and is amplified by Exhibits A to Z, so that the whole of it makes a volume of 431 printed pages. It sets out fully the history of the relations and transactions between the King Estate and the Humble Oil & Refining Company, and the other parties, with all of the documents, including the notes, the deed of trust and the oil and gas leases, evidencing the transactions, together with many allegations of fact to support the contention that the leases were security for the debt and that the rights under them terminated when the debt was paid.

This Court's opinion in Cause No. A-3126 expresses at length the reasons for the conclusion that no cause of action is alleged and that none can be alleged. The reasons may be stated briefly thus: All parties concede that the Federal litigation adjudged the leases to be valid grants of the minerals. The respondents, plaintiffs in district court, are barred by the parol evidence rule from establishing what they seek to establish, that is, that the

leases, although valid grants, were intended as security for the debt and were to terminate when the debt was paid, because that would be to insert by parol an additional condition into a determinable fee.

The decision was not that the allegations of the petition are insufficient, but that no cause of action for redemption is alleged or can be alleged. Thus the record, particularly the plaintiffs' petition, affirmatively discloses an insuperable barrier to recovery by the plaintiffs on the right of redemption theory. Nothing would have been accomplished by remanding the cause. *Williams* v. *Safety Casualty Co.*, 129 Texas 184, 190, 162 S. W. 2d 178; *City of Brownsville* v. *Basse & Hord*, 43 Texas 440, 454.

Respondents' brief seems to argue that the district court may review and interpret this Court's judgment and even that the validity of the judgment may be tried in district court. That argument cannot be sustained. The Court said in *Conley* v. *Anderson* (Tex. Sup.) 164 S. W. 985, 986:

> "This court, having upon writ of error reversed the judgment of the district court in the former suit, and having entered final judgment in that case, no district court had jurisdiction to review that judgment, nor to interpret and enforce it, but must observe it as it was framed by this court. The interpretation and enforcement of that judgment belongs exclusively to this court, and no interference with its enforcement will be tolerated."

In No. A-3126 the Court had jurisdiction of the cause and of the questions which it decided. The rendition of the judgment implied the decision by the Court that it had jurisdiction of what was adjudged. And even if it were true, as respondents argue, that error or errors were committed in the decision of the questions or in the judgment, the error or errors would not detract from or lessen the

conclusive binding effect of the judgment. *City of Brownsville* v. *Basse & Hord,* 43 Texas 440, 453.

Respondents argue that they are entitled to assert in district court the right to their "day in court" and to a trial by jury, so that those questions may be passed upon as the basis for review by the Supreme Court of the United States. Affirmance of the trial court's judgment sustaining the plea of *res judicata* as a bar to the plaintiffs' suit did not deprive the defendants of their "day in court" nor of a trial by jury. And the same propositions presented here by respondents that there are issues yet to be tried in the district court and that respondents have been deprived by the judgment of this Court of the right to their "day in court" and to a jury trial, were urged in the argument filed in Cause No. A-3126 in support of their motion for rehearing, and were decided by the Court adversely to respondents in the overruling of the motion for rehearing.

Respondents' written demand for a jury, filed in Cause No. 1539 in the district court after the rendition of the final judgment of this Court in Cause No. A-3126, is a demand for a jury "for the trial of all issues of fact, and of each and every issue of fact raised by the pleadings in said cause", and shows that respondents are taking procedural steps to try the issues foreclosed against them by this Court's judgment.

We find from examination of the many interrogatories recently filed by respondents in the district court that they are undertaking to take testimony covering all of the transactions, alleged in the plaintiffs' petition in Cause No. 1539 and shown by the exhibits, beginning with the death of Mrs. King and her will, and including transactions between Mrs. King's estate and certain trustees, the making of the oil and gas lease of January 13, 1933, long ago re-

leased, the financial condition of the King Estate, the making of the loan by the Humble Oil & Refining Company, the execution of the oil and gas leases which respondents have sought to avoid, with interrogatories inquiring as to the adequacy of the consideration for the leases and the reasonableness of their terms, and interrogatories undertaking to elicit testimony that the leases were intended as security for the loan and inquiry as to other facts which respondents have urged throughout the litigation as tending to prove that the leases are invalid on various grounds and that the rights under them terminated when the debt was paid. None of the interrogatories, except probably four or five of them, are relevant to the one issue that remains to be tried, that is, the issue of accounting for royalty that may be owing and unpaid to respondents, the Atwoods.

As we understand the record, there is no controversy about the ownership by the Atwoods, subject to the oil and gas leases, of certain interests in the minerals in the land described in their petition, and the royalty rate is fixed by the leases. This being true, accounting will be accomplished without inquiry into remote transactions and without trial of title. The inquiry will be as to the amount and value of oil or gas that may have been produced for which respondents, the Atwoods, have not been paid their part. The interrogatories filed, with the exception noted, undertake to obtain testimony to support respondents' claims of invalidity of the leases and their contention that the leases are mortgages and subject to redemption. These issues have been determined adversely to respondents by this Court's judgment.

The request for admissions filed by respondents cover substantially the same ground as the interrogatories, and are filed in an effort to make proof of the same issues.

In the taking of the procedural steps above described respondents are seeking to litigate again matters and issues already litigated and decided by this Court's judgment, and in so doing they are disregarding and interfering with that judgment. And since the record shows that they are insisting on the prosecution of that procedure and the retrial of issues concluded by this Court's judgment, a writ of prohibition will issue to prevent interference with the judgment of this Court or with its enforcement. *Hovey* v. *Shepherd,* 105 Texas 237, 147 S. W. 224; *Conley* v. *Anderson* (Tex. Sup.) 164 S. W. 985; *Continental State Bank* v. *Floyd,* 131 Texas 388, 114 S. W. 2d 530; *Sparenberg* v. *Lattimore,* 134 Texas 671, 139 S. W. 2d 77.

A writ will not be issued against the respondents, the two district judges, because it is not alleged in relator's petition that they have permitted or that they intend to permit the taking of procedural steps for the trial of issues concluded by this Court's judgment, and we do not assume that they will permit the disregarding of the judgment of this Court or interference with its enforcement.

A writ of prohibition will issue commanding the respondents herein, other than the two district judges, to desist and refrain from undertaking to cause to be tried in the district court of Willacy County, Texas, or any other Texas court, any of the issues that were raised or presented in the plaintiffs' First Amended Original Petition in Cause No. 1539 in the district court of Willacy County, Texas; from filing any petition or interrogatories or requests for admissions or other instruments in the said court or courts in preparation for trial or for the purpose of trying any of said issues; from taking any procedural steps or instituting any proceedings for the trial of any issue in said Cause No. 1539 other than the issue of accounting to respondents, the Atwoods, for royalty that

may be due them under the leases involved in that cause; from instituting or causing to be instituted or prosecuting or causing to be instituted or prosecuted in the district court of Willacy County, Texas, or any other Texas court, any suit or other proceeding for the trial of any of the issues that were raised or presented in the said First Amended Original Petition or for the trial of any of the issues that were concluded by this Court's judgment in Cause No. A-3126; from applying for commission to take, or proceeding further with the taking of, depositions on the interrogatories filed by respondents in Cause No. 1539 in the district court on May 16, 1952, and from presenting or proceeding further with the request for admissions filed in said Cause No. 1539 and served on relator's attorney on May 19, 1952; and from instituting or prosecuting any suit or any proceeding or suing out any process in the district court of Willacy County, or any other Texas court, that will interfere with this Court's judgment in Cause No. A-3126 or with its enforcement.

Graham B. Smedley
Associate Justice

GBS:P

Associate Justice Garwood not sitting.

Opinion delivered:
November 26, 1952

APPENDIX II.

IN THE SUPREME COURT OF TEXAS
Humble Oil & Refining Company v. *Atwood,*
244 S.W. (2d) 637.

The parties will be identified as in the trial court where the Atwoods were plaintiffs and the defendants were the Humble Oil & Refining Company, the King Ranch, a corporation, and various members of the King and Kleberg families.

The principal question is: Can an oil and gas lease be adjudicated to be both a mortgage and a grant of minerals under a line of cases beginning with *Stamper* v. *Johnson,* 3 Tex. 1, and continuing through *Bradshaw* v. *McDonald,* 147 Tex. 455, 216 S. W. 2d. 972? The answer is "No."

We reach this question as a result of long and involved litigation between the Atwoods and other heirs who jointly inherited the King Ranch. This ranch was administered for a period under a trust established by an ancestor of all parties. Becoming dissatisfied with the administration of the trust, the Atwoods filed and prosecuted to judgment three suits in the U. S. District Court for the Southern District of Texas, styled, respectively: *Atwood* v. *Kleberg,* Equity Action No. 74, Main Case and Ancillary, on appeal 163 F. 2d. 108; *Atwood* v. *Kleberg,* Equity Action No. 102; and *Atwood* v. *King,* Equity Action No. 101, on appeal 133 F. 2d. 69, on rehearing 135 F. 2d. 452. That portion of this Federal litigation material to this case consisted of an attack upon oil and gas leases executed by the trustees. In the Federal litigation it was determined that the minerals had not been severed prior to the creation of the trust; that the trustees had authority to execute the oil and gas

leases; that the leases as executed did not violate the trustees' duty to the cestui que trust; and that the oil and gas leases involved here were valid.

Following these adverse decisions, the Atwoods brought this suit in the Texas courts seeking: (1) an adjudication that the oil and gas lease on that portion of the ranch partitioned to them is a mortgage, and for redemption; (2) cancellation of the oil and gas lease "because extending 18½ years and longer beyond the end of a limited ten-year trust form;" (3) reformation; (4) an accounting; (5) damages; (6) and general relief. The King Ranch corporation and other defendants joined Humble in resisting the attacks.

Both sides plead res adjudicata and estoppel by reason of the Federal litigation and both vigorously argue that *Moore* v. *Snowball,* 98 Tex. 16, 81 S. W. 5, supports their contention. On Item (1), plaintiffs contend that the debt was not finally paid until after the judgments in the Federal cases, so that the case at bar neither could nor should have been urged in that litigation. The trial court severed the issues of res adjudicata and estoppel and upon them rendered judgment for defendant that plaintiffs take nothing.

In the case at bar the Court of Civil Appeals held (239 S. W. 2d. 412):

(a) That in the Federal litigation plaintiffs sought to have the leases declared *invalid* for a number of reasons, all of which were determined against them;

(b) that in the case at bar plaintiffs do not seek to have the leases declared invalid but instead seek to have them declared *valid as mortgages;*

(c) that the cause of action asserted in the case at bar could not and should not have been raised in the

Federal litigation because an action to redeem from a mortgage may not be brought prior to the satisfaction of the obligation, which did not occur until after the termination of the Federal litigation.

(d) that the issue of mortgage *vel non* was not determined for either party in the Federal litigation.

(e) that the judgment of the trial court should be reversed and the cause remanded for trial on the issue of mortgage.

Items (2) and (3) above were determined against plaintiffs in *Atwood* v. *Kleberg,* 133 F. 2d. 69, and we do not pass upon them other than to hold that they were there decided. Since we have determined that no cause of action is asserted in Item (1), plaintiffs are not entitled to either damages or general relief under Items (5) and (6).

Upon Item (1) we do not reach *Moore* v. *Snowball, supra.* Defendants contend that the Federal courts have three times adjudicated the leases under attack here to be valid mineral leases and an instrument cannot be at the same time both a lease and a mortgage. Plaintiffs reply that:

> "This argument ignores the fact that, while a given conveyance may be a lease in truth and in fact, yet it may also have been executed as security for a debt and for that reason in equity 'be treated as a mortgage.' "

Clearly such an attack as that alleged in Item (1) is barred by the parol evidence rule unless the attack comes within the exception that a deed absolute may be proved to have been intended to serve as security for a debt and adjudicated to be a mortgage.

In *Bradshaw* v. *McDonald, supra,* is found the statement that "the rule allowing an absolute deed to be proved a mortgage • • • relates to that one type of document and

to that sole purpose." Plaintiffs contend, to the contrary, that this exception to the parol evidence rule should operate upon any estate in land, should not be limited to a deed of the entire fee, and governs the case at bar, citing *Stephens* v. *Sherrod,* 6 Tex. 294; *De Bruhl* v. *Maas,* 54 Tex. 464; *Nugent* v. *Riley,* 42 Mass. (I Met.) 117; *Lanfair* v. *Lanfair,* 35 Mass. (18 Pickering) 299; *Barnett* v. *Williams* (Ky.) 101 S.W. 1191; *Johnson* v. *Hataway,* 155 Ala. 516, 46 So. 760; *Mostyn* v. *Lancaster,* 23 Ch. D. 583. These citations require an analysis of the basic elements of a mortgage in Texas and its legal effect.

The early common law recognized two kinds of landed securities. Blackstone in Sec. III of Chap. X (Of Estates Upon Condition) p. 156, identifies these as "• • • *vivum vadium,* or living pledge; and *mortuum vadium,* dead pledge, or mortgage." He defines a mortgage as a grant of fee upon condition of repayment of a debt and this has come down as the traditional language used in most mortgage forms.

Originally, possession passed by livery of seizin to the mortgagee. And back of this lies one of the historical reasons for the use of language of grant in a mortgage. Because the distinction between interest and usury was a slow growth, the emergence of the concept of a return upon money capital (as distinguished from land) brought on an intense conflict between the ecclesiastical and common law courts. During a long period any return upon a loan might be declared usury, the parties to it caught in the friction between the common law and the ecclesiastical jurisdictions, and the unfortunate creditor subjected to fine, imprisonment, ransom at the King's pleasure, and exposure on the "pillaire, to their open rebuke and shame." So the creditors sought refuge in the feudal tenures and secured a return upon their loans in the form of rents and profits accompanying the right of possession. As the

concept of usury changed and the law recognized interest as "toothless" usury,[1] and as Chancery developed the equity of redemption, possession remained with the mortgagor, but the form of the conveyance continued in general use, and often plagues the courts to this day. Osborne, *On Mortgages,* Sec. 5.

Because the *mortuum vadium* was a use of legal machinery to accomplish a purpose for which it had not been designed, many harsh results flowed from it, for " " " the common law knew of no better way to treat debtors than to make them live up to their bargains, " " ." Thomas, *On Mortgages,* p. 6. To the common law judges, thoroughly drilled in the formal discipline of Traditional Logic, the law often became an exercise in logic. Walled in by the rigidity of their syllogisms, they were untouched by the currents of empirical thought which turned Chancery towards the Civil Law. The result is described by Coote in his *On Mortgages,* Chap. I, (ii), p. 4.

> "Thus mortgages stood at common law, and it is difficult to conceive, if the Courts of Law had been so inclined (which it does not seem they were), on what principle they could have proceeded in giving the debtor relief. The forfeiture was complete; the mortgagee, by the default of the mortgagor, had become the absolute owner of the estate; it could not be divested from him without a reconveyance, and there remained no remedy short of an actual legislative enactment, without disturbing the settled landmarks of property."

To remedy this situation, Chancery evolved the equity of redemption by holding that although " " " they could not alter the legal effect of the forteiture at common law, they operated on the conscience of the mortgagee, and, acting *in personam,* they declared it unreasonable that he should retain for his own benefit what was intended as a

[1] J. B. C. Murray, **History of Usury,** Chap. II.

mere security; and they adjudged * * * that the mortgagor had an equity to redeem on payment * * * notwithstanding the forfeiture at law. * * * The judges of common law strenuously opposed the introduction of this novelty; and though ultimately defeated by the increasing power of equity, they nevertheless in their own Courts still adhered to the rigid doctrine of forfeiture, * * *." Coote, *On Mortgages,* Chap. II, (iii) pp. 12, 13. See also Osborne, *On Mortgages,* Sec. 1, p. 6.

There followed a period of confusion caused by jealousy between the Courts of Law and Equity.

> "* * * For a number of years both law and equity courts exercised concurrent jurisdiction over mortgages, resulting in great confusion, more especially while the courts of the common law continued to be presided over by men whose early training had led them to regard the interference of the courts of equity as an offensive innovation. But in course of time the justness of the decrees of the chancellors gradually came to be recognized by the common-law courts and were acquiesced in by them." Jones, On Mortgages, Sec. 9, p. 11.

The equitable views finally made their way into the common law in the opinions of Lord Mansfield who was, however, criticized for having "on his mind prejudices derived from his familiarity with the Scottish law, where law and equity are administered in the same courts. * * *." Powell, *On Mortgages,* p. 267.

In America, the states are split into two mains groups on mortgages. Some states give effect to the language of grant in a mortgage and are referred to as "title" states for the reason that they hold title passes. The other group are called "lien" states for they hold that neither title nor possession passes. There are many variations between them.

Our Texas mortgage developed in a blended system of Law and Equity administered in one court. In *Stephens* v. *Sherrod, supra,* it is recognized, upon authority of Kent and Story, that our mortgage grew out of sales upon condition of non-payment of a debt, or accompanied by a defeasance. One of the differences, between the *mortuum vadium* and the Texas mortgage is that if the condition were not faithfully complied with under the *mortuum vadium,* the land was forever lost, while generally under our Texas mortgage it was early determined that the legal title remains in the mortgagor and can only be transferred by foreclosure, or by sale where the power of sale is contained in the instrument. Although to this day the early form of an absolute grant with a defeasance is in common use, now by statute and court decision a mortgage is a mere lien regardless of the language used in the instrument itself. *Duty* v. *Graham,* 12 Tex. 427; *Willis* v. *Moore,* 59 Tex. 628; *Hudson* v. *Eisenmayer, Sr., Milling and Elevator Co.,* 79 Tex. 401; *Carroll* v. *Edmondson,* 41 S.W. 2d 64. As a result of Chancery action in developing the equity of redemption, the common law courts were forced to superimpose upon the parol evidence rule an exception allowing a deed absolute to be adjudicated a mortgage if the parties intended that it be security for a debt.

We reach now our immediate problem: What is the result of equitable action upon a deed declared to be a mortgage? The answer can only be that it became a lien regardless of the language of grant in the deed just as a mortgage is declared to be a lien regardless of its language of grant.

The nature of the equitable action involved is not cl .r. The phrase *equity of redemption* meant originally the equitable right of the mortgagor to recover his property upon payment of his debt. Subsequently it was applied to the mortgagor's rights before default as an equitable estate, and then again loosely to the difference in value between

the debt and the security. Pomeroy, *Equity Jurisprudence,* Sec. 1180. Osborne, *supra,* Sec. 7. Here we are concerned only with the nature of the equitable cause of action. The transition from a written defeasance separate from the deed to a verbal defeasance presents the main difficulty because of the Statute of Frauds. Some writers treat this cause of action as one for specific performance of a promise to execute a legal mortgage. Osborne, *supra,* Sec. 27, but this clearly does not fit the case at bar. Some writers treat it as specific performance of a verbal promise to hold as security. Osborne, *supra,* Sec. 28. In the *Restatement of the Law,* the problem of declaring a deed to be a mortgage is discussed under Restitution, Chap. 10, where it is treated as a problem in constructive trust, Sec. 182, pp. 735, 736; or again it is treated as a question of unjust enrichment. Glenn, *On Mortgages,* Sec. 171. In some jurisdictions it is approached as a question of reformation. Glenn, *supra,* Sec. 11. Perhaps one basis might be, in the main, historical, or stated another way, a refusal to retrogress. The courts will not allow a creditor to go back of the evolution of the law and take advantage of a form of conveyancing which anteceded the development of the mortgage. A creditor may not turn back the pages of legal history and force the court to re-fight the old battle between law and equity. When he tries to do so he will be brought up to date by having his deed declared to be a mortgage even though a portion of the transaction be verbal. The same reasons prevent a retrogression which impelled the development of the equity of redemption.

This equitable doctrine has been used in Texas primarily to prevent an overreaching although there may have been no misrepresentation of fact at the execution of the instrument. In the case which introduced this exception to the parol evidence rule into Texas jurisprudence, *Stamper* v. *Johnson,* 3 Tex. 1, the Court recognizes that the exception is truly an equitable doctrine.

In *Eckford* v. *Berry,* 87 Tex. 415, 28 S. W. 937, it is stated that one of the reasons for this exception to the parol evidence rule was that "the skill of the conveyancer, aided by the stern rule of evidence, would have enabled the exacting creditor to overreach and finally crush the necessitous and defenseless debtor in a court of law, despite the equity of redemption created and cherished alone by the courts of equity for the protection of the debtor."

Without specifying the exact nature of the equitable remedy, the Texas courts in this situation have from the first disregarded the acts of the parties in executing the instrument and raised a lien just as they have disregarded the actual language of the ordinary mortgage. It is clear that in Texas when a deed absolute on its face is declared to be a mortgage it is not a grant of title but is instead from its inception a mere lien. In *Mann* v. *Falcon,* 25 Tex. 271, the Court said:

> "• • • the verdict • • •. • • • establishes that the supposed title relied on by the plaintiffs for a recovery, was a mortgage, and the consequence is that the rights and remedies of mortgagor and mortgagee attach to the parties to the instrument, and to the parties to the suit, • • •."

That the Court has power to look beyond the instrument to the entire factual situation in determining whether or not plaintiffs assert an equity of redemption has been true from its earliest development in Chancery. Coote, *On Mortgages,* Chap. II, (iv) p. 13. This is the law in Texas. In *Loving* v. *Milliken,* 59 Tex. 423, the Court said:

> "In determining whether an instrument is to be construed as an absolute conveyance or a mortgage when there is no defeasance expressly agreed upon equity looks to all the circumstances preceding and attending the execution of the instrument, and sometimes to those which have subsequently occurred."

The transaction at bar in no way resembles the line of cases beginning with *Stamper* v. *Johnson, supra.* Here the trustees of the King Ranch were unable in 1933 to borrow a very large sum of money they needed from any concern in the business of lending money. Humble, a company whose business is the production, refining, and sale of oil and its products and not the lending of money, had a subsisting oil and gas lease covering a portion of the King Ranch. Humble agreed to cancel this oil and gas lease and to loan the King Ranch $3,500,000.00. The trustees of the King Ranch executed one note for $500,000.00, bearing interest at the rate of five per cent. per annum, payable annually, and a second note for $3,000,000.00. Both of these notes were secured by a deed of trust in favor of Humble. At the same time the trustees granted to Humble two separate oil and gas leases, one of which covered in excess of 900,000 acres and the other in excess of 76,000 acres. Both were for a term of 20 years. Simultaneously, the parties executed a separate contract reciting the execution of the two oil and gas leases and stipulating an agreed annual rental for a 20-year period of $127,824.60 per year. They also agreed that the $3,000,000.00 note was to bear interest at the rate of five per cent. per annum (subsequently reduced to three per cent.). Instead of Humble paying the annual rental in cash and the King Ranch paying the interest in cash, they agreed that the annual rental should be offset against the interest, with a provision for the difference. The King Ranch agreed to pay $150,000.00 upon the principal each year during the second ten years of the 20-year period, with the privilege of paying the notes before maturity. Humble agreed to pay the King Ranch Trust five per cent. interest upon any prepayments made before maturity. The King Ranch agreed that Humble might, during the first 10 years, apply the proceeds of any royalties accruing under the two oil and gas leases upon the principal indebtedness except that the King Ranch

Trust could demand enough of the royalties to pay that portion of its income tax due by reason of the royalties.

Simultaneously with the execution of these instruments the parties entered into another agreement in the form of a letter providing that Humble was not obligated to do exploratory work during the first five years, but that during the remaining 15 years Humble should explore the entire area by approved geophysical and geologic techniques. Humble was not required to drill wildcat wells but was required to drill any offset wells. Humble agreed to develop any productive structure found with reasonable diligence and to produce from such structures under the orders of the Railroad Commission a quantity of oil that was equal to approximately that portion of their total production in Texas that the proven reserves on the leased premises bore to the total Humble proven reserves in Texas.

The leases themselves provided that at the termination of the 20-year period Humble might designate and define in writing the areas from which oil was being produced and retain them so long as oil and gas were produced, it being contemplated that Humble would retain an entire geological structure.

The King Ranch trustees used the money borrowed from Humble to pay pressing short-term loans, Federal estate, and State Inheritance taxes. The balance was expended in operation. The deed of trust covered substantially all of the King Ranch lands and was made subject to the oil and gas mineral leases.

The original King Ranch Trust lasted by its terms 10 years and expired on March 30, 1935, at which time the lands were partitioned, subject to both the mineral leases and the Humble deed of trust.

All of these facts are plead by plaintiffs and copies of the instruments are attached as exhibits to their petition.

There stands out from this transaction the fact that Humble secured an oil and gas lease which obligates it to pay a total rental over a 20-year period in excess of $2,500,000.00. At the same time it loaned the King Ranch $3,500,000.0 at interest and took as security a deed of trust with the proviso that the rentals and royalties from the oil and gas lease should be credited on the debt.

In order to make clear plaintiffs' contention that an instrument they say is a mortgage also operated as a grant of minerals, we copy from their brief:

> "• • • Even if the lease did vest a determinable fee simple title in Humble, it can be shown by parol that such title was vested simply as part of the security for a debt.
>
> "• • •
>
> "The entire argument presented by • • • Humble • • • is based upon the reiterated use of the word 'mortgage' and the references made to the various rights and covenants of the leases, including the so-called correlative rights, obligations to drill, etc. None of these provisions are inconsistent with the idea that the leases, however conditioned, may have been executed and delivered as security for a debt. If they were, then so long as the debt remained unpaid and they remained security for its payment, all of their provisions were in full force and effect, including the provisions defining drilling obligations, correlative rights, etc. But these provisions could not survive the payment of the debt for which they were in fact security. With the payment of the debt, they failed because all of these provisions, being mere security for a debt, could not survive payment of the debt."

This contention remotely resembles the ancient *vivum vadium* which Blackstone defines as:

> "*Vivum vadium,* or living pledge, is when a man borrows a sum (suppose £200) of another; and grants him an estate, as of £20 *per annum,* to hold till the rents and profits shall repay the sums so borrowed.

The *vivum vadium* early fell into disuse. A trace of it survives in an obscure form of pledge known as a Welsh mortgage where the mortgagee has possession in lieu of interest upon his debt. It seems to have been "substantially the same as an ordinary mortgagee in possession under the later English law who must account in equity for the rents and profits." Osborne, *On Mortgages,* Sec. 1, p. 4. Any such conception is wholly inconsistent with the actualities of an oil and gas lease.

If plaintiffs' contention be considered against the right and risk of development arising from an oil and gas lease, it is readily apparent that the very nature of an oil and gas lease is inconsistent with such a mortgagor-mortgagee relationship, because, unlike a deed absolute, it imposes positive obligations running from the lessee to the lessor which must be performed under a determinable fee estate, else the estate terminates. The expense of exploration, the payment of rental, the outlay of capital and the time required to pay for development, the duty to protect against drainage, and all of the correlative rights between the parties which arise upon the discovery of oil present an entirely different factual situation from that in which a deed is pledged to secure a debt. If Humble took the risk of drilling a well which turned out to be dry, it might lose the cost of drilling; but if the well produced, royalty from it would be applied upon the debt and, under plaintiffs' contention, thus shorten the life of the lease.

The statement quoted from *Bradshaw* v. *McDonald, supra,* should not be given the construction that an absolute deed is the only instrument which can be shown to have been intended to be a mortgage. Such a construction is not supported by the authorities. In that case this Court held that it made no difference in proving a deed to be a mortgage that the deed recited a contractual consideration. Our holding here is not in conflict with that case because plain-

tiffs here seek to insert an additional condition into a determinable fee—that the lease shall last *until the debt be paid,* instead of *so long as oil and gas be produced.* A condition terminating the life of the estate is altogether different from a contractual consideration. As we understand plaintiffs' contention, if they prevailed, they would end up with an instrument which would be during the life of the debt (and subsequently the lease) still an oil and gas lease imposing obligations upon the lessee of development, of the payment of rental, etc.,—obligations entirely foreign to our previous conception of the position of a mortgagee and the retention of title by the mortgagor. Normally the mortgagee expends his money when the debt is created and is seeking security for its recovery. He does not lend his money for the purpose of obligating himself to his debtor, nor to search for oil at great risk in the hope that if he strikes oil he will recover his debt and expenses and allow the debtor who has taken no risk the profits. So in reality that which plaintiffs seek to establish here is not a mortgage but a different oil and gas lease which is the very thing the parol evidence rule was devised to prevent, for clearly this is an attempt to insert by parol an additional condition into a determinable fee. As such, it is barred by the parol evidence rule for under Texas law if the instrument be a grant of minerals it cannot at the same time be a mere lien, or mortgage. *Willis* v. *Moore, supra; Tittle* v. *Vanleer,* 89 Tex. 174, 29 S. W. 1065, 37 L. R. A. 337. And it cannot change its nature in mid-stream. From the equity maxim "once a mortgage always a mortgage" it follows that the instrument must have been a mortgage at its inception or not at all. Pomeroy, *supra,* Sec. 1193. Plaintiffs cannot come into equity and assert that what they have admitted to be a grant is not a grant but is something less, a lien, and seek to have the instrument adjudicated a lien. Thus stated, their position is untenable. Recognizing

this, they do not seek an adjudication that the instrument is a mere lien, but instead seek an adjudication that the instrument is a grant coupled with a determining condition, something altogether different from a lien.

It is true that in *McLean & Curry* v. *Ellis,* 79 Tex. 398, it is stated that the right to prove a deed to be a mortgage is a substantial one "not to be varied or defeated by any form of expression or character of recitals contained in the instrument itself." We are not in conflict with that case because our ruling here is based not upon recitals alone but upon the entire factual situation, including the obligations imposed upon the lessees which have been carried out. *Loving* v. *Milliken, supra;* Coote, *On Mortgages,* Chap. II, (iv) p. 13.

Most of the cases plaintiffs rely upon are from jurisdictions holding a mortgage to be a grant of fee accompanied by a defeasance. Originally in England there was a grant of the fee. For Coote says that although the Chancery "could not alter the legal effect of the forfeiture at common law," *i.e.,* could not prevent the grant of the fee from finally vesting upon condition broken, still, acting *in personam* they "operated on the conscience of the mortgagee" and forced restitution. So plaintiffs' contention that the instruments at bar could be held both a grant of minerals and at the same time a mortgage under *Mostyn* v. *Lancaster,* 23 Ch. D. 583, might have been good in England before 1925. Since 1925 by statute a mortgage in England is a charge upon the land comparable to the American concept of a lien. Osborne, *supra,* Sec. 12. For the same reason the Massachusetts cases of *Nugent* v. *Riley, supra,* and *Lanfair* v. *Lanfair, supra,* are not in point. Pomeroy, *Equity Jurisprudence,* Sec. 1187. See also *Ewer* v. *Hobbe,* 5 Met. 1, and *Howard* v. *Robinson,* 5 Cush. 119.

And again for the same reason the Alabama case of *Johnson* v. *Hataway,* 46 So. 760, where a lease of the timber on the described land to use for turpentine, saw mill and other purposes was held to be a mortgage, is not in point. See Pomeroy, *supra,* Sec. 1187. See also *Mallory* v. *Agee,* 147 So. 881, 88 A. L. R. 1107. The Alabama view that a mortgage passes both title and possession was urged in 1854 in the argument of the first Texas case raising this subject, *Duty* v. *Graham, supra,* and was rejected.

Plaintiffs do not allege a conditional delivery of the oil and gas lease or contend that the mineral estate was not to vest until the King Ranch trustees defaulted in payment of the debt. Plaintiffs do not here contend that Humble has made a fraudulent use of the instrument by drilling, producing and marketing oil and gas under it and thus bring themselves within the reasoning of *Mead* v. *Randolph,* 8 Tex. 191, or *Redwine* v. *Coleman,* C.C.A. 1934, 71 S. W. 2d 921, writ refused, and indeed they could not because of the Federal litigation. *Landa* v. *Isern,* 141 Tex. 455, 174 S. W. 2d 310.

The debt continued after the execution of the oil and gas lease so plaintiffs do not allege a conditional sale of the oil and gas lease within *Ruffier* v. *Womack,* 30 Tex. 332.

In discussing the powers of the trustees in the motion for rehearing (135 F. 2d 452) the Circuit Court of Appeals said:

> "The proof established beyond controversy that the lease was incident to and a part of the consideration for a loan or mortgage secured under difficult and trying conditions to save the estate and made under the express authority given in the will to borrow money and mortgage the property."

Upon the adverse termination of that case, the Atwoods construed the language quoted just above to mean that the oil and gas lease was itself a mortgage. Following final

payment of the debt, they brought this action to redeem the mineral estate under their lands from it. Our holding here is not in conflict with the Federal case, because when the entire opinion and the judgment are examined in that case it becomes clear that the point under discussion was the authority of the trustees to execute an oil and gas lease. Clearly the meaning of the above language is that since the trustees had the authority to borrow money and mortgage the property, they had also the authority to grant an oil and gas lease as a part of the consideration for a loan. We do not pass upon the point of law involved. We do overrule plaintiffs' contention that *Atwood* v. *Kleberg*, 135 F. 2d 452, adjudicated the oil and gas leases to be a mortgage. The only conclusion which the opinion and the facts of that case will warrant is that Humble made the loan in exchange for the oil and gas leases.

Having determined that plaintiffs plead no cause of action, it is unnecessary for us to determine whether it was, or either could or should have been adjudicated in the Federal litigation. Plaintiffs' petition is full and we do not believe that plaintiffs can add to it. Accordingly, the judgment of the Court of Civil Appeals is reversed and the judgment of the trial court that plaintiffs take nothing is affirmed without prejudice to plaintiffs' right to an accounting for any money which may be due them as royalty owners under the oil and gas lease. Since plaintiffs prayed for an accounting and that portion of the case was severed before appeal, the trial court may proceed with that portion of the case, but only for the purpose of an accounting.

Costs of appeal are taxed against respondents (plaintiffs below).

WILL WILSON
Associate Justice

WW:A
Opinion delivered: Oct. 31, 1951.

APPENDIX III.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Atwood v. *Kleberg,* 135 F. (2d) 452.

PER CURIAM.

The motion presents for consideration only two matters which might be called new. One of these is appellant's insistence that our opinion goes beyond the findings of fact, the conclusions of law, and the judgment of the District Court, and determines the question which was reserved in the conclusions of law and the judgment, "whether or not the trustees of the Estate of Henrietta M. King have properly and fairly partitioned her estate by the deeds of partition executed by them, that question being left for determination in other litigation pending in this court." The opinion expressly setting out [133 F. 2d 69, 71]; "The district judge, because the same matters were at issue in another suit then pending in the same court, reserved all questions as to whether the trustees under Mrs. King's will had fairly selected and distributed the particular properties partitioned under the residuary clause of her will, and decided all of the other questions against plaintiffs," concluded: "We find no error in the judgment, and it is affirmed."

(1) The judgment followed the opinion. If, therefore, the opinion contains any expression, and we find none, which purports to dispose of the matters the district judge reserved, such expression would be wholly without effect on the reserved proceedings. The opinion did not authorize any adding to or taking from the judgment. It author-

ized merely its affirmance, and the mandate will follow the opinion.

(2) The second matter is that since our opinion was filed, the Supreme Court of Texas has, in *Avis* v. *First National Bank of Wichita Falls,* decided, contrary to the decision of this court, that trustees in a will containing no express power to make an oil lease, have no power to do so. An examination of the *Avis* case leaves in no doubt that the language of the will there construed and the circumstances surrounding its execution and the execution by the trustees of the powers conferred are wholly dissimilar to those here, and that the decision is not in conflict with ours here either in what it decides or in what it says. It rests on the ascertained intention of the testator[1] in the circumstances there disclosed of conflict between the interest of the life tenant and the remainderman beneficiaries.[2] There are no remaindermen and life tenants here. All of the beneficiaries take by the same title. Here in addition to the comprehensive enumeration of powers in Par. I of the will, set out in our opinion, the will devoted an additional paragraph III to a further enumeration of powers. Included in these were the following: "To carry on any such business as they may deem it proper to carry on, on or in connection with the lands or personal property

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[1] "The primary rule governing the construction of wills is to ascertain the intention of the testator. This intention shall be, if possible, gathered from the instrument itself. Furthermore, in order to ascertain the intention of the testator expressed in the will, the language used therein may be construed in connection with the surrounding facts and circumstances existing at the time the will was made."

[2] "A testamentary trustee, holding land in fee in trust * * * to pay the entire net proceeds to a beneficiary for life, with remainder to his heirs, holds it for the benefit of the remainderman as well as the life tenant, and, in the absence of language authorizing such trustee to make mineral leases, he is not authorized to grant the right to take the gas and oil from the property where no wells were open on the property at the time of the creation of the trust."

or any part thereof which they are empowered to manage and control and generally to do all such acts in the premises in reference to and with said property or any part thereof as an owner similarly situated might do not inconsistent with the provisions of this will."

Finally, this paragraph of the will contained a clause giving to her trusted son-in-law, Robert J. Kleberg, Sr., one of the trustees, if living, and to a majority of the trustees, if he was dead, the power of final and binding decision as to any of their duties or acts. But this is not all. The proof establishes beyond controversy that the lease was an incident to and a part of the consideration for a loan or mortgage secured under difficult and trying conditions to save the estate and made under the express authority given in the will to borrow money and mortgage the property. The motion for rehearing is denied.

Opinion dated: April 6, 1943.

No. 727

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MAY 11 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

EDWIN K. ATWOOD, ALICE B. ATWOOD, BASCOM COX, FRED B. WAGNER, JOHN Q. ADAMS, E. WAYNE WILSON, AND THOMAS HART FISHER, *Petitioners*,

v.

HUMBLE OIL & REFINING COMPANY, A TEXAS CORPORATION, ELIZABETH A. BALDWIN, JAMES P. BALDWIN, RICHARD W. ATWOOD, A NON COMPOS MENTIS, AND HIS GUARDIAN, B. D. TARLTON, AND KING RANCH, A CORPORATION, *Respondents*

On Petition for a Writ of Certiorari to The Supreme Court of Texas

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BRIEF FOR RESPONDENTS IN OPPOSITION

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IN THE

Supreme Court of the United States

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On Petition for a Writ of Certiorari to The Supreme Court of Texas

---

BRIEF FOR RESPONDENTS IN OPPOSITION

The Opinions Below

The opinion on which Petitioners seek a review by this Court is reported as: HUMBLE OIL & REFINING COMPANY v. FISHER, ET AL., 253 S.W. 2d 656. It appears also at page 82 of the Record. Also involved are the opinions in HUMBLE OIL & REFINING COMPANY v. ATWOOD, 244 S.W. 2d 637, and ATWOOD v. KLEBERG, 133 Fed. 2d 69; on motion for rehearing 135 Fed. 2d 452.

Summary Statement

Respondents are not in agreement with and are unwilling to accept as correct Petitioners' "Summary Statement of The Matter Involved." We prefer to present our own statement.

We believe that a correct and accurate statement will disclose that this Court is without jurisdiction of the matters here involved, because (1) There is no Federal question presented; (2) There is no question of "full faith and credit" involved; and (3) All issues presented were disposed of by the Supreme Court of Texas on non-federal grounds, which fully support its decree.

This is but one belated part in a long series of litigation begun in 1935, through which the Petitioners, Atwood, have sought to cancel, avoid and set aside certain mineral leases on their lands, bequeathed to them by their maternal grandmother, Henrietta M. King.

The first suits were in Federal Court:

I.

EDWIN K. ATWOOD, ET AL., v. ALICE G. K. KLEBERG, ET AL. No. 101 in Equity, in the United States District Court for the Southern District of Texas. Judgment in said cause held Respondents' mineral leases to be valid in all respects. The judgment was affirmed on appeal, 133 Fed. 2d 69, on motion for rehearing 135 Fed. 2d 452.[1] This Court denied certiorari, 320 U.S. 744, 64 S. Ct. 45.

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[1] Petitioners treat the opinion filed on rehearing as the only opinion in the case. (See Appendix III, Petition). The main opinion, dealing fully with the issues involved, appears in 133 Fed. 2d 69. It affirms the judgment of the trial court that Petitioners take nothing by their suit.

II.

EDWIN K. ATWOOD, ET AL., v. ROBERT J. KLEBERG, JR., ET AL., No. 74 Ancillary, same trial court. Petitioners failed to recover, and this judgment was also affirmed on appeal. 163 Fed. 2d 108. This Court again denied certiorari. 332 U.S. 843, 68 S. Ct. 267, 268.

III.

EDWIN K. ATWOOD, ET AL., v. RICHARD KING, JR., ET AL., No. 102 on the docket of the same trial court. In this suit Petitioners also failed of recovery, and this judgment was also affirmed. 163 Fed. 2d 108 (consolidated on appeal with Equity 74, above). Certiorari was also denied. 332 U.S. 843, 68 S. Ct. 267, 268 (Three cases).

On failure to prevail in Federal Court, Petitioners sought relief in the Texas State Courts, and filed suit in the District Court of Willacy County, Texas, setting up identical bases for recovery, denied them in the Federal Court (R. 99). They were met on the threshhold, in the State Court, with pleas of *res judicata* (App. II, Pet., p. 44; R. 84). Under Rule 174, TEXAS RULES OF CIVIL PROCEDURE,[2] based upon Federal Rule 42, the trial court ordered a severance of issues and a separate trial on the issues presented, other than the issue of accounting (R. 8). Thus, upon entry of such order, in legal contemplation, Petitioners had two lawsuits pending in the District Court of Willacy County; one to be tried, on the severance, the other (the accounting suit) to remain on the docket untried, pending final disposition of the separate trial.

[2] The rule reads in part: "(b) Separate Trials. The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims or issues."

On the separate trial, judgment again went for the defendants (Respondents here) that plaintiffs (the Atwoods) "are not entitled to any of the relief sought by them in this suit, and that such relief be and the same is hereby denied" (R. 84). This judgment, the Texas Supreme Court construed to be a "take nothing" decree (R. 8).

On appeal to the Supreme Court of Texas, the decree of the trial court was in all things affirmed (R. 8; see also HUMBLE OIL & REFINING CO. v. ATWOOD, 244 S.W. 2d 637). The Supreme Court of Texas provided that its affirmance of the trial court's "take nothing" judgment would be "without prejudice, however, to the said plaintiffs' (Petitioners') right to an accounting for any money which may be due them as royalty under the oil and gas lease" (R. 8).

Contrary to Petitioners' view, repeatedly expressed (Pet. 8, 13, 21, 26), The Supreme Court of Texas *did not* remand the cause then before it for further proceedings in the trial court. It rendered a judgment affirming the judgment of the trial court, but permitted the trial court to proceed to trial on the one matter that had never been brought up on appeal, and which was, therefore, still before it—the issue of accounting (R. 8). No part or portion of the *appealed* case was remanded, and no further proceeding in the *appealed* case was authorized in the trial court. In fact The Supreme Court of Texas held in the proceeding for Writ of Prohibition, which Petitioners seek to bring before this Court for review, that it was because of the *finality* of its prior judgment that the writ should issue:

> "The decision (244 S.W. 2d 637) was not that the allegations of the petition are insufficient, but that no cause of action for redemption is alleged or can be alleged. Thus the record, particularly the plaintiffs' petition, affirmatively discloses an insuperable barrier to recovery by the plaintiffs on the right of redemption

theory. *Nothing would have been accomplished by remanding the cause.*" (R. 89).

So, clearly, the judgment was final and there was no remand for further proceedings relating to the appealed cause.

Petitioners failed to apply to this Court for relief from such final judgment of the Texas Supreme Court within the delays allowed by law. Their motion for rehearing was overruled (R. 90), and mandate issued, January 24, 1952 (R. 8-9), and more than a year has now expired since the decree of The Supreme Court of Texas became final.

Petitioners then sought to take procedural steps in the trial court to try the issues determined against them by The Supreme Court of Texas in the above suit (R. 92). It was at this juncture that Writ of Prohibition was applied for (R. 1, et seq.). Because there was nothing pending before the trial court but the severed suit for accounting, the procedural attempt to try issues previously decided against them by a final judgment of The Supreme Court of Texas amounted to an interference with that Court's judgment:

> "In the taking of the procedural steps above described respondents are seeking to litigate again matters and issues already litigated and decided by this Court's judgment, and in so doing they are disregarding and interfering with that judgment. And since the record shows that they are insisting on the prosecution of that procedure and the retrial of issues concluded by the Court's judgment, a writ of prohibition will issue to prevent interference with the judgment of this Court or with its enforcement." (R. 92).

The writ issued (R. 137). Petitioners' whole complaint before this Court, therefore, proceeds upon the erroneous premise that because the judgment of The Supreme Court of Texas "remanded" the cause, its judgment was not "final"

in the sense that they then had recourse to this Court for review by certiorari, and because of the "remand" they had then pending a cause in which they could assert their "Federal rights" for presentation to this Court on subsequent appeal. Petitioners thus state this erroneous premise:

> "The judgment of the Supreme Court of Texas in *Humble Oil & Refining Company v. Atwood* (Appendix II, *post* p. 59) reversed and remanded the cause for further proceedings, *without deciding the res judicata issue upon which petitioners' claims of Federal right depend.* It was not at that time a final adjudication of petitioners' Federal right and could not become a final judgment until such further proceedings should be terminated (Pet. III, p. 26)."

What Petitioners fail to apprehend is that, in HUMBLE OIL & REFINING COMPANY v. ATWOOD, 244 S.W. 2d 637, there were no "further proceedings" to "be terminated," and that, because of the finality of the judgment of The Supreme Court of Texas in that cause, their "Federal rights," if any they had, had been determined against them, with no petition to this Court seeking relief, within the delays prescribed by law.

Respondents' "Summary Statement" asserts another contention which is not supported by the record. It is contended (Pet. 6, 8, 9, 12, 21) that The Supreme Court of Texas refused to consider the opinion on motion for rehearing in the Federal Court in ATWOOD v. KLEBERG, 135 Fed. 2d 452, where it was stated, in effect, that the lease held by Respondent was "an incident to and a part of the consideration for a loan or mortgage." This, Petitioners aver, gave rise to a Federal question, in that, they contend, such holding by the United States Court of Appeals amounted to an adjudication by that Court that the lease was necessarily "a mortgage from which they could redeem," (Pet. 25), and

that the "full faith and credit clause" could be invoked because The Supreme Court of Texas "thrice held that it did not reach the Federal question." (Pet. 20). Petitioners are in error in their contentions as to what The Supreme Court of Texas states that it did not reach and what it said it was unnecessary for it to determine. What that Court did not reach, and what it found unnecessary to determine was *Respondents'* plea of *res judicata—not* any plea interposed or question raised by Petitioners. The Supreme Court of Texas did not, as Petitioners aver, refuse "to consider the effect of the prior judgment of the United States Court of Appeals as a substantive muniment of title," (Pet. 6-7), for The Supreme Court of Texas stated in no uncertain terms:

> "We do overrule plaintiffs' contention that Atwood v. Kleberg, 135 F. 2d 452, adjudicated the oil and gas leases to be a mortgage." (HUMBLE OIL & REFINING COMPANY v. ATWOOD, 244 S.W. 2d 637, at 645; Pet. 59).

Having thus held, it became unnecessary, as the Court correctly states, to reach the problem posed by *Respondents* as to whether or not the question of redemption had been, or could have been determined in the Federal suits. Obviously, if there was no mortgage there could be no issue of redemption to consider, either in the Federal or State Courts.

By the holding quoted next above, The Supreme Court of Texas did meet head on and consider the effect of the prior judgment of the Court of Appeals, and, in doing so, gave full faith and credit to the judgment which affirmed the United States District Court decree that Petitioners "take nothing," and, as to which this Court refused review on application for certiorari. (320 U.S. 744, 64 S. Ct. 45). It is obvious, therefore, that all that Petitioners here draw in question

is the *construction* placed by The Supreme Court of Texas on the *opinion* (as distinguished from the *judgment*) of the United States Court of Appeals, which, of course, does not raise a "full faith and credit" question at all.

Having decided, therefore, that the United States Court of Appeals, in holding Respondents' leases to be *valid*, had NOT held them to be security for a loan or mortgage, it devolved upon The Supreme Court of Texas to determine the merits of the case presented, under Texas law—that is, on non-federal grounds. This it did, by holding, in effect, that under Texas law a general demurrer to Petitioners' complaint in the trial court was good, since they did not, and could not state a cause of action, under Texas law.

Finally, we point out a most remarkable statement, made categorically, three times in the Petition and Brief (Pet. 2, 4; Brief, p. 18) that "the value of the leasehold interests alone was *admittedly* over $17,000,000." As support for the representation that the value was "admittedly" over $17,000,000, Petitioners refer to "Tr. 117," which is a copy of their own *First Amended Original Petition* filed in the State Court of Willacy County, Texas, and attached as an exhibit to their Motion for Rehearing before The Supreme Court of Texas. With Respondents contesting Petitioners' allegations and contentions all the way through the trial and appellate courts of Texas, to and through its Supreme Court, it is, indeed, to be extremely charitable, a very loose interpretation of the record to represent to this Court that such is an *admitted* fact.

Jurisdiction

The jurisdiction of this Court is invoked by Petitioners under Act of Congress of June 25, 1948, C. 646, 62 STAT. 928; U.S.C.A. Title 28, Section 1257.

Respondents challenge jurisdiction in this Court under the Acts of Congress relied upon by Petitioners and on any other ground.

Questions Presented

Again, Respondents are unable to agree with Petitioners on the matter of the questions presented, since the questions proposed by Petitioners are predicated upon their Statement of the Case, with which we do not agree. We submit the following:

FIRST:

Whether this Court has jurisdiction to review by certiorari, a peremptory writ of a State Court which issued to preserve and protect its jurisdiction and enforce its judgment in a prior proceeding where the State Court's judgment became final without application, by the aggrieved party, to this Court for relief within the time and in the manner prescribed by law.

SECOND:

Whether a State Court's construction of language used in an *opinion* of a Federal Court, whether right or wrong, raises a Federal question, based upon the "full faith and credit" clause of the Constitution.

THIRD:

Whether this Court has jurisdiction to review by certiorari, a peremptory writ of a State Court which issued to preserve and protect its jurisdiction and enforce its judgment in a prior proceeding, where the State Court's judgment in the prior proceeding is fully sustainable on non-federal grounds.

Brief of the Argument

THERE IS NO FEDERAL QUESTION PRESENTED FOR DETERMINATION BY THIS COURT.

A. Because Petitioners allowed a prior judgment by the Supreme Court of Texas, adjudicating every issue here presented, against them, to become final, without seeking timely review by this Court.

If it be admitted, which, of course, it is not, that a substantial federal question or questions existed in the appeal of HUMBLE OIL & REFINING COMPANY v. ATWOOD, 244 S.W. 2d 637, no federal question is presented by the issuance of the Writ of Prohibition which enforces the decree entered by The Supreme Court of Texas in that appeal, since Petitioners suffered that decree, including a disposition of all federal questions, if any, to become final without seeking review by this Court. The Supreme Court of Texas thus succinctly states the point:

> "In No. A 3126 *(Humble Oil & Refining Co. v. Atwood*, 244 S.W. 2d 637) the Court had jurisdiction of the cause and of the questions which it decided. The rendition of the judgment implied the decision by the Court that it had jurisdiction of what was adjudged. And even if it were true, as respondents (Petitioners here) argue, that error or errors were committed in the decisions of the question or in the judgment, the error or errors would not detract from or lessen the conclusive and binding effect of the judgment. * * * And the same propositions presented here by respondents that there are issues yet to be tried in the district court and that respondents have been deprived by the judgment of this Court of the right to their 'day in court' and to a jury trial, were urged in the argument filed in Cause No. A-3126 in support of their motion for rehearing, *and were decided by the Court adversely to respondents in the overruling of the motion for rehearing.*" (R. 90).

The judgment being conclusive, it was, therefore, final, as to all questions, including federal questions, and there were no questions, federal or otherwise, to preserve or try in the District Court of Willacy County, other than the accounting case, when the Writ of Prohibition issued.

There being no federal rights open and pending in the District Court of Willacy County for Petitioners to protect and preserve, this Court is without jurisdiction to review and disturb a peremptory writ by a State Court which issued to preserve and protect its jurisdiction and enforce its decree.

Succinctly stated, the matter resolves itself simply to this: Petitioners' sole complaint is, that the Writ of Prohibition issued by The Supreme Court of Texas in the case at bar, prevents them from preserving certain federal rights in prior pending litigation. Since there was no remand of the cause heretofore pending before The Supreme Court of Texas, and the judgment entered by it has become final, the existence of pending litigation wherein those "federal rights" may be protected and preserved is but a figment of Petitioners' imagination.

This final judgment also concluded the sole federal question here asserted by Petitioners, viz., the claimed denial of full faith and credit to the prior federal proceedings. The prohibition proceeding did not reopen or relitigate this *res judicata* issue or any other. It did no more than enforce the first judgment, which was final as to every issue in the appeal before the court, and Petitioners concede that the first case involved the *res judicata* issue now asserted (Pet. Br. 6-8). If this was a reviewable federal question, the case to be reviewed was the first case. The point was squarely passed upon by this court in RIO GRANDE WESTERN RY. CO. v. STRINGHAM, 36 S. Ct. 5, 239 U.S. 44, 60 L. Ed. 136:

> "Manifestly, the first judgment was final within the meaning of Judicial Code paragraph 237 * * *. And as the question sought to be presented arises upon the first judgment—it being final in the sense of paragraph 237—it is apparent that the writ of error addressed to the second judgment presents nothing reviewable here."

But were Petitioners correct in saying that The Supreme Court of Texas "remanded" the prior suit, they still have delayed too long in the assertion of their rights, for it cannot be denied that the decision of The Supreme Court of Texas in HUMBLE OIL & REFINING COMPANY v. ATWOOD, ET AL., 244 S.W. 2d 637, in affirming the "take nothing" judgment of the trial court, effectively and with finality disposed of every material and substantial question in the case, including any so-called "federal rights" which Petitioners might have had. That being the case, under the more modern rule and decisions by this Court, the decree of The Supreme Court of Texas in that case was of such *finality* as to give this Court jurisdiction for review, if federal rights and questions were, in fact, involved. MARKET STREET RAILWAY COMPANY v. RAILROAD COMMISSION OF CALIFORNIA, 65 S. Ct. 770, 324 U.S. 548, 89 L. Ed. 1171. RADIO STATION WOW v. JOHNSON, 65 S. Ct. 1475, 326 U.S. 120, 89 L. Ed. 2092. CARONDELET CANAL & NAVIGATION COMPANY v. LOUISIANA, 34 S. Ct. 627, 233 U.S. 362, 58 L. Ed. 1001. Having failed to apply for review by this Court within the delays allowed by law, they are too late in the assertion of those rights which have been adjudicated against them by the highest Court of the State in which they brought their suit.

B. There is no issue presented which involves the question of "full faith and credit" in regard to a prior judgment of a Federal Court.

The United States Court of Appeals, by its *judgment* in ATWOOD v. KLEBERG, 133 Fed. 2d 69, held Respondents' leases to be valid and binding. This Court concurred by denying certiorari, 320 U.S. 744, 64 S. Ct. 45. What Petitioners are now in fact asserting is that "full faith and credit" was not accorded to the Federal decision because The Supreme Court of Texas did not attach greater significance to a statement of the Federal Court in its *opinion* on motion for rehearing, than it did to the *judgment* of that Court, holding Respondents' lease to be a valid lease. The statement by the Court of Appeals, in its opinion on motion for rehearing, that Respondents' lease was "an incident to and a part of the consideration for a loan or mortgage," cannot, as Petitioners urge, form the basis of title or a property right for two cogent reasons: (1) The statement in the opinion does not constitute an *adjudication* in any sense of the word; and (2) A statement by the Court, in the course of its opinion, cannot change or modify, in any respect, the effect of the judgment entered. The Supreme Court of Texas gave full consideration to Petitioners' contention and affirmatively overruled them by stating that ATWOOD v. KLEBERG, 135 Fed. 2d 452, did not adjudicate "the oil and gas lease to be a mortgage," and, therefore, did not give to Petitioners any title or property right under Texas law. It is apparent, therefore, that The Supreme Court of Texas did not refuse to pass upon Petitioners' so-called Federal question, as they now assert; but that it did pass upon the effect of the Court's statement and construed it contrary to Petitioners' view. A construction by a State Court of a prior opinion by a Federal Court does not raise the issue of "full faith and credit." BOARD OF COMMISSIONERS v. COCKRELL, 91 Fed.

2d 412 (C.C.A. La.), cert. den. 58 S. Ct. 142, 302 U.S. 740, 82 L. Ed. 572; SAFE-CABINET COMPANY v. GLOBE-WERNICKE COMPANY, 293 Fed. 568 (C.C.A. Ill.), cert. den. 44 S. Ct. 335, 264 U.S. 586, 68 L. Ed. 862.

But Petitioners urge the view that The Supreme Court of Texas was referring to *their* claim of title and property rights when it stated that "it is unnecessary for us to determine whether it was, or either could or should have been adjudicated in the Federal litigation" (Pet. App. 59). The record simply does not sustain this view. It is patent from the preceding paragraph of the opinion that the Court found it unnecessary to pass upon *Respondents'* plea of *res judicata,* since the Court had "determined that plaintiffs (Petitioners here) plead no cause of action" under Texas law, after giving "full faith and credit" to the Federal opinion and holding against plaintiffs' contention that such opinion "adjudicated the oil and gas lease to be a mortgage." Patently the State Court was likewise referring to Respondents' *res judicata* plea, and not to Petitioners', in its opinion in the Prohibition proceeding (253 S.W. 2d 656), when it again gave full consideration to the Federal decision, rejecting Petitioners' claim that the opinion established in them the basis for a claim of title. The holding there, again, was that it was unnecessary to consider *Respondents'* plea of *res judicata,* and, therefore, to determine whether Petitioners could or should have adjudicated the redemption claim in the Federal litigation—*not* that it was unnecessary to consider *Petitioners'* claim as to the effect of the Federal Court's opinion.

The Federal opinion and judgment were considered and construed. When the effect of the actual adjudication of a court is duly considered and accepted, and in no wise challenged, but merely construed, no substantial Federal question arises and there is no basis for review. STATE OF ARK.,

EX REL., UTLEY V. ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, 46 S. Ct. 66, 269 U.S. 172, 70 L. Ed. 219.

When the validity of a Federal decision is not challenged, no substantial Federal question arises by virtue of State Court action, under local law in the implementation of it, or the resolution of matters not conclusively covered or determined by it. LEATHE V. THOMAS, 28 S. Ct. 30, 207 U.S. 93, 52 L. Ed. 118; AVERY V. POPPER, 21 S. Ct. 94, 179 U.S. 305, 45 L. Ed. 203; STATE OF ARK., EX REL. UTLEY V. ST. LOUIS-SAN FRANCISCO RAILWAY CO., supra.

THE DECISIONS OF THE SUPREME COURT OF TEXAS ARE FULLY SUSTAINABLE ON NON-FEDERAL GROUNDS.

The case of ATWOOD V. KLEBERG, 133 Fed. 2d 69, clearly and without question held the leases, now still under attack by Petitioners, to be valid and binding leases. This Court, by denying certiorari (320 U.S. 744) concurred. This presented the question, in the subsequent suit filed in State Court, whether or not a valid and binding mineral lease could, under local law, be a lease and a mortgage at one and the same time. The Supreme Court of Texas determined that it could not. HUMBLE OIL & REFINING COMPANY V. ATWOOD, 244 S.W. 2d 637. The decision, in effect, says that a general demurrer was good as against the plaintiffs' (Petitioners') complaint in the State trial court, and Petitioners are now in the incongruous position of saying that they were denied their "day in court" by such ruling, and are entitled to "trial by jury" on the question of the applicability of a general demurrer.

The question disposed of by The Supreme Court of Texas was one purely of local law, and this Court's jurisdiction does not, therefore, attach. MURDOCK V. MEMPHIS, 20 Wall. 590, 22 L. Ed. 429; ENTERPRISE IRRIGATION DIST. V. FARMERS'

MUT. CANAL CO., 243 U.S. 157, 164, 165, 37 S. Ct. 318, 61 L. Ed. 644.

Respondents, therefore, respectfully submit that the petition for certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 727

EDWIN K. ATWOOD, ALICE B. ATWOOD, BASCOM COX, FRED B. WAGNER, JOHN Q. ADAMS, E. WAYNE WILSON, and THOMAS HART FISHER,
Petitioners,

vs.

HUMBLE OIL & REFINING COMPANY, a Texas corporation, ELIZABETH A. BALDWIN, JAMES P. BALDWIN, RICHARD W. ATWOOD, a non compos mentis, and his Guardian, B. D. TARLTON, and KING RANCH, a Texas corporation,
Respondents.

Petitioners' Reply Brief.

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Respondents.

Petitioners' Reply Brief.

The judgment of the Supreme Court of Texas in *Humble Oil & Refining Company* v. *Atwood,* 244 S.W. (2d) 637 (Appendix II, Petition for Certiorari, p. 43) did not become final (in the sense required to start the time running for an appeal by certiorari to this Court) until the Su-

preme Court of Texas granted its peremptory writ of prohibition and denied rehearing in *Humble Oil & Refining Company* v. *Fisher,* 253 S. W. (2d) 656 (Appendix I, Petition for Certiorari, p. 29). The reason is that no final decision of Petitioners' Federal rights has ever been made in the State court of last resort in the *Atwood* case, because the writ of prohibition in the *Fisher* case has peremptorily prohibited Petitioners from obtaining it.

Respondents' Brief is conclusively answered by a return to the very simple facts in this case:

In *Atwood* v. *Kleberg,* 135 F. (2d) 452, the Federal Court of Appeals decided that the mineral leases in question were "an incident to and a part of the consideration for a loan or mortgage" and were valid *only* because of the "authority given in the Will to borrow money and mortgage the property." (The mineral leases were *not* held "to be valid *in all respects*", as Respondents say, p. 2, etc.) In other words, the Federal Court of Appeals held that the mineral leases were "a part of the consideration for a loan" and the loan was made "in exchange for the oil and gas leases", *exactly* as the Supreme Court of Texas itself held in the *Atwood* case (Appendix II, Petition for Certiorari, p. 59).

Respondents contend (p. 13-14) that the Federal holding and decision were merely the *opinion* of the Federal Court and not its *judgment.* But under the doctrine of estoppel, the judgment estops all parties from disputing *the basis for such judgment* as expressed in the *opinion* in which the *judgment* is rendered.

It is this principle of estoppel upon which Petitioners relied in pleading the Federal judgment as the Federal ground for their causes of action for redemption and usury, and which is for convenience referred to as Peti-

tioners' plea of *res judicata.* Similarly, Respondents' so-called plea of *res judicata* is based upon the same estoppel principle.

There is thus no dispute between Petitioners or Respondents or the Supreme Court of Texas as to *what* was decided by the Federal Court of Appeals. The only disputed question is whether the Texas Supreme Court gave or even considered giving full faith and credit to what was so decided. While the Federal judgment did not adjudicate "the oil and gas leases to be a mortgage" *in those precise terms,* this was necessarily *the legal effect* of the Federal judgment. For the *sole basis* for the *judgment* was that the mineral leases in question were "a part of the consideration for a loan or mortgage", which loan was made "in exchange for the oil and gas leases" under "authority given in the Will to borrow money and mortgage the property". This Federal judgment thus conclusively supports and establishes *Petitioners'* causes of action for both redemption and usury as pleaded in the Texas trial court.

The Federal judgment conclusively supports and establishes Petitioners' cause of action for *redemption,* because whatever property is conveyed by a mortgagor to a mortgagee "as part of the consideration for a loan or mortgage" made "under the express authority to borrow money and mortgage the property" must be redeemable as mortgaged property. To deny the remedy of redemption after the mortgage debt is paid is to confiscate the mortgagor's property. This is what the Supreme Court of Texas did to Petitioners' property when it thrice refused (by holding it was "unnecessary") to consider, and thus to give full (or any) faith and credit to, the Federal judgment.

Likewise the Federal judgment conclusively supports and establishes Petitioners' cause of action for *usury.* As we

show below, the mineral leases admittedly had a value so large that, since they were made as "a part of the consideration for a loan", as the Federal judgment held, then the loan was necessarily usurious. To deny Petitioners the remedy of avoidance of the usurious mineral leases after the usurious debt was paid was to confiscate Petitioners' property. This is what the Supreme Court of Texas did when it thrice refused (by holding it was "unnecessary") to consider, and thus to give full (or any) faith and credit to, the Federal judgment.

The crucial fact, therefore, which is *not* disputed by Respondents' Brief, is that the Supreme Court of Texas flatly refused to consider and to give full (or any) faith and credit to this Federal judgment and thrice stated in its two opinions in the *Atwood* and *Fisher* cases that it was "unnecessary" to do so. What the writ of prohibition did was to carry this denial of Federal right into conclusive effect in the *Fisher* case.

We do not agree with Respondents' ingenious argument (p. 14) that the Supreme Court of Texas "found it unnecessary to pass upon *Respondents'* plea of *res judicata*", but did pass upon *Petitioners'* plea of *res judicata*. It could not possibly have done so, and it did not do so. *For both Petitioners' and Respondents' pleas of res judicata were based upon the same identical record and judgment in the Federal Court.* The Texas Supreme Court *could not* have examined the Federal record solely with a view to ascertaining only the rights of the parties *on one side.* The plain truth is, as the Texas Supreme Court thrice said, that it refused to consider the matter of *res judicata* at all. In other words, the Texas Supreme Court refused even to consider, let alone decide, Petitioners' Federal right to have full faith and credit given to the Federal judgment by the Texas courts.

That Respondents have misconceived the Texas Supreme Court's deliberate intention not to pass upon *Petitioners'* plea of *res judicata* (as distinguished from *Respondents'* plea) is *conclusively* shown by the opinion in the *Fisher* case. The Texas Supreme Court there said:

> "As has been said, this Court's opinion in Cause No. A-3126 [the *Atwood* case] does not pass upon the question *whether the alleged cause of action for redemption* [Petitioners' cause of action] *has been adjudicated in the Federal litigation.* The opinion is expressed that it is *unnecessary to do so . . .*" (Appendix I, Petition for Certiorari, p. 37.)

Similarly, the Texas Supreme Court said in the *Fisher* case that in its earlier opinion it had,

> "after discussing at length the question or questions raised by those allegations, fully made in the [Petitioners'] petition and constituting most of the petition, expressed the conclusion above quoted [the language here considered in the *Atwood* case] that . . . it was *not necessary* to determine whether the [Petitioners'] cause of action for redemption was or could have been adjudicated in the Federal litigation" (Appendix I, Petition for Certiorari, p. 33-4.)

Respondents' theory that the Texas Supreme Court was holding that it was unnecessary to consider the Federal judgment only in relation to *Respondents'* plea of *res judicata* cannot be sustained.

Respondents' claim (p. 3) that "the trial court ordered a severance of issues and a separate trial on the issues presented, other than the issue of accounting (R. 8)" is absolutely false. What was severed, *and all that was severed*, were the *res judicata* pleas of *both Petitioners' and Respondents*, which were alike based upon *identically* the same Federal judgment (Tr. 63). Both the order of severance (Tr. 63) and the "Trial Judgment" of the trial court conclusively show this (Tr. 65-7).

We are very surprised by Respondents' challenge (p. 8) of the truth of our statement (Petition, p. 2, 4; Brief, p. 8) that "the value of the leasehold interest alone was *admittedly* over $17,000,000", upon the ground that, while this statement appears in Petitioners' *First Amended Original Petition,* its truth was denied in Respondents' Answers. This challenge misconceives the point. It was for the very reason that the sole issues which were severed for trial and actually tried in the trial court were both the Petitioners' and Respondents' pleas of *res judicata* based upon an identical Federal judgment, that the trial court held that *all allegations of fact* in Petitioners' *First Amended Original Petition* must be assumed to be true. The trial court said (Tr. 64-5): "The [trial] court must assume them [the allegations of Petitioners' *First Amended Original Petition*] to be correct in passing on this matter", to which the Defendants' counsel replied: "I think the [trial] court must look at it as he would in an old plea of *general demurrer.*" (Tr. 65.) This is confirmed by Respondents' Brief (p. 15) which states: "The decision [of the Supreme Court of Texas in the *Atwood* case], in effect, says that a *general demurrer* was good as against the Plaintiffs' [Petitioners'] complaint in the State trial court."

Can it be doubted that a *general demurrer* concedes the truth of all facts in the pleading to which it is addressed, exactly as the trial court and Respondents have agreed?

Throughout Respondents' Brief, no mention whatever is made of the Petitioners' cause of action for usury which was pleaded in Petitioners' *First Amended Original Petition* (Tr. 130-1, 136). The obvious purpose of ignoring Petitioners' cause of action for usury is that *nothing whatever was said* by the Supreme Court of Texas in its original opinion in the *Atwood* case on the subject of usury. It

was only when the Texas Supreme Court rendered its subsequent opinion in the *Fisher* case that the Texas Supreme Court conceded that the issue of usury "was not referred to in the [*Atwood*] opinion" (Appendix I, Petition for Certiorari, p. 36), yet inconsistently maintained that it had decided the issue of usury (p. 36), though without deciding or even considering the Federal ground upon which the usury issue rested (p. 33-4, 37-8), at the same time conceding that it might have done so erroneously (p. 38).

To sum up, what the Texas Supreme Court actually did, when it issued its writ of prohibition in the *Fisher* case, was to evade the Federal issue as to the impact of the prior Federal judgment upon the Petitioners' rights (and the Respondents' rights, for that matter, also) by the *obvious subterfuge* of pretending *first*, that it had the jurisdiction to adjudicate the usury issue without deciding, or even considering, the Federal grounds therefor, and *second*, that it had exercised such jurisdiction in the *Atwood* case, although in the *Fisher* case it conceded that it had never mentioned the usury issue in the *Atwood* case, and repeated its refusal even to consider, upon the ground that it was "unnecessary" to do so, the effect of the Federal judgment thereon.

Such action by the Texas Supreme Court deprived Petitioners of their Federal right to have the Texas courts consider and give full faith and credit to the Federal judgment in relation to usury.

All that is said above as to the issue of usury is equally applicable to the issue of redemption, except that the Texas Supreme Court squarely stated that it was deciding the redemption issue in the *Atwood* case exclusively upon non-Federal grounds. By deliberately refusing to decide the Federal question as "unnecessary", Petitioners were de-

prived of their Federal right to have the Texas courts consider and give full faith and credit to the Federal judgment in relation to redemption, no less than in relation to usury.

Respondents argue that the Texas Supreme Court's decision in the *Atwood* case was "final" in the sense that it is now too late for Petitioners to file their petition for Certiorari in the *Fisher* case in this Court. Their argument is that there was not a "remandment" of the *Atwood* case to the trial court (p. 4-6, 11-12), because the Texas Supreme Court merely affirmed the trial court "without prejudice, however, to the said plaintiffs' [Petitioners'] right to an accounting" (Tr. 8). This, they say, disposed of Petitioners' Federal rights in the *Atwood* case "with finality" as though upon "a general demurrer" (p. 15). They also argue (p. 3) that the order of severance "in legal contemplation" left "two lawsuits pending in the District Court of Willacy County", the one being that involving the Federal issue (the *res judicata* pleas) and the other involving the non-Federal issues.

Respondents' theory that, because all Federal issues have been decided by the State Court of last resort, the appeal must be taken by certiorari at once, even though non-Federal issues remain for determination in the lower court under the upper State Court's order, has never been adopted by this Court. The case of *Rio Grande Western Ry. Co.* v. *Stringham,* 239 U.S. 44, upon which Respondents rely (p. 11) for this proposition, does not so hold. On the contrary, in that case the State Supreme Court having "disposed of the whole case on the merits, directed what judgment should be entered and left nothing to the judicial discretion of the trial court" (p. 47 of this Court's opinion). This brought that case within the rule that there is "finality" only where nothing more remained

to be done to carry the State Supreme Court's judgment into effect except a "ministerial act", *Gospel Army* v. *Los Angeles,* 331 U.S. 543, 546; *Republic Gas Co.* v. *Oklahoma,* 334 U.S. 62, 68.

None of Respondents' other cases cited (p. 12) are relevant. They all involved the issue as to whether the appeal by certiorari was taken *too soon,* not *too late.* This is a wholly different question, involving practical problems of "irreparable injury" to the Petitioner seeking certiorari and other factors not relevant here. *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U.S. 541, 546.

Certainly this Court has never held that a judgment of a State Court is "final" so as to start the period for certiorari running where, as in the case at bar, the State Court has expressly and deliberately refused to decide, or even to consider, the Federal question, and has returned the case to the trial court (whether upon the theory of remandment or partial determination of the non-Federal questions is not material) for further litigation of non-ministerial character. Of course, if the State Supreme Court's decision is "fully sustainable on non-Federal grounds", as Respondents argue (p. 15), then the appeal to this case will fail *upon the merits.* But this question of the merits has nothing to do with the question of "finality" with which we are here concerned.

The fact that the Texas Supreme Court in the *Fisher* case prohibited further litigation of the Federal issue in the trial court so that a second judgment was required in the Supreme Court of Texas to bring to "finality" the litigation in the trial court in the *Atwood* case proves our point. In *McComb* v. *Commissioners of Know County,* 91 U.S. 1, and *Great Western Telegraph Co.* v. *Burnham,* 162 U.S. 339, this Court held that a judgment is not final if a second appeal is required, even though the latter "be a

mere formality because governed by the law of the case established in an earlier appeal." *Parker* v. *Illinois,* 333 U.S. 571, 576. In the case at bar, the proceedings in the trial court were not "a mere formality because governed by the law of the case established in an earlier appeal" in the *Atwood* case. Petitioners were attempting to assert their Federal rights in the trial court, and were still entitled also to further litigation of their non-Federal rights there. In such circumstances, the writ of prohibition in the *Fisher* case was the "final" judgment of the Supreme Court of Texas, and these certiorari proceedings have been timely filed therefrom.

Respondents pretend that the Texas Supreme Court merely "construed" the Federal judgment and that this "does not raise the issue of 'full faith and credit' " (p. 13). The obvious answer is that the Texas Supreme Court refused even to consider the effect of the Federal judgment, and this *does* raise a Federal question, to-wit, the issue of "full faith and credit."

Finally, Respondents argue (p. 15) that the Texas Supreme Court's decision in the *Atwood* case was "fully sustainable on non-Federal grounds" because it decided a question which "was one purely of local law", and "this Court's jurisdiction does not, therefore, attach." This begs the Federal question. This Court has always held that a State Court cannot, by resting its decision on local or general law, defeat the appellate jurisdiction of this Court, where the Federal claim, if recognized and enforced, would require a different judgment. *West Chicago St. R. Co.* v. *Illinois,* 201 U.S. 506; *Chicago, B. & Q. Ry. Co.* v. *Illinois,* 200 U.S. 561; *American Express Co.* v. *Iowa,* 196 U.S. 147.

To return to the issue of finality, the Texas Court did not pass upon Petitioners' Federal claim of *res judicata*

(or Respondents' claim of *res judicata,* for that matter) and did not render a final decision in the *Atwood* case. The decision in the *Atwood* case became final in the sense of preventing Petitioners from further asserting their Federal right in the State Court only when the subsequent decision in the *Fisher* case said that the *Atwood* decision was final and forbade further proceedings.

The result of all of this *legerdemain* is that Petitioners obtained an adjudication by the United States Court of Appeals that their leases were incidental to and part of the consideration for a usurious loan and mortgage, but could not enforce their rights in that case because the debt had not yet been paid. After they had paid the debt and when they sought to realize in the Texas Courts the Federal rights adjudicated in their favor by the Federal court, the Supreme Court of Texas refused to entertain their claim of *res judicata* and to give full (or any) faith and credit thereto, but remitted them to the trial court (whether by the technique of remandment, or partial affirmance, is immaterial) for further litigation. When Petitioners sought to conduct that further litigation, they were inhibited by the writ of prohibition in the *Fisher* case.

We submit that these facts, once understood in their simplicity, show a denial of full faith and credit, finally confirmed by a process of adjudication, amounting to what Judge Frankfurter calls an *obvious subterfuge* in the *Radio Station WOW* case, so extraordinary as to deny due process of law and to defeat Petitioners' Federal right to full faith and credit as enacted in Section 1738 of the Judicial Code (U.S.C.A., Title 28, Sec. 1738).

Respectfully submitted,

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